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THE

Weekly Reporter,

APPELLATE HGH COURT,

CONTAINING

ISIONS OF THE APPELLATE HIGH COURT IN ALL ITS BRANCHES—VIZ., IN CIVIL, REVENUE, AND CRIMINAL CASES, AS WELL AS IN CASES REFERRED BY THE MOFUSSIL SMALL CAUSE COURTS; TOGETHER WITH LETTERS IN CRIMINAL CASES, AND THE CIVIL AND CRIMINAL CIRCULAR ORDERS ISSUED BY THE HIGH COURT; ALSO DECISIONS OF H.M.'S PRIVY COUNCIL IN CASES HEARD IN APPEAL FROM COURTS OF BRITISH INDIA.

BY D. SUTHERLAND.

VOLUME III.

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The Weekly Reporter,

APPELLATE HIGH COURT.

The 9th May 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Limitation—Registration of Suit.

Case No. 3171 of 1864.

Special Appeal from a decision passed by the Additional Judge of Dacca, dated the 30th July 1864, affirming a decision passed by the Sudder Ameen of that District, dated the 25th April 1863.

Juggobundhoo Bose and others (Defendants), *Appellants,*

versus

Gour Monee Dossia (Plaintiff), *Respondent.*

Mr. A. F. Lingham and *Baboos Chunder Madhub Ghose* and *Sreenath Banerjee* for Appellants.

Baboos Onoocool Chunder Mookerjee and *Kalee Mohun Doss* for Respondent.

The law does not declare that the date of registry of the plaint shall be taken to be the date of institution of a suit. A plaintiff, who has *bonâ fide* instituted his case within time, will not be prejudiced by delay in registration.

PLAINTIFF sued to reverse an order of the thakbust authorities passed on 26th May 1859.

The defendant pleaded limitation, inasmuch as the present suit was not instituted till 27th May 1862, and also that the lands in dispute belonged to him, and not to the plaintiff.

The first Court gave plaintiff a decree, and, on appeal, the Judge held that limitation did not apply, and affirmed the order of the first Court on the merits.

Defendant now appeals specially, urging that the suit was registered on the 27th May; that the date of registry must be taken to be the date of institution, and that plaintiff, therefore, is clearly out of time.

The Lower Courts both found that the plaint was filed on the 26th May. There is nothing in the law declaring that the date of registry shall be taken to be the date of the institution of a suit; and though a plaint should be registered as soon after it is presented as possible, yet any failure on the part of a Civil Officer to act with proper despatch in this particular will not prejudice a plaintiff, who has *bonâ fide* instituted his case within time; and, as this seems to be the case with the present plaintiff, we dismiss the special appeal with costs.

The 9th May 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Jurisdiction—Suit between ryots (for illegal appropriation of produce)—Mesne-profits.

Case No. 3167 of 1864.

Special Appeal from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated the 11th August 1864, affirming a decision passed by the Additional Sudder

Ameen of that District, dated the 10th October 1863.

Joy Kishen Mookerjee and others (Defendants), *Appellants,*

versus

Jodoonath Ghose (Plaintiff), *Respondent.*

Baboos Banee Madhub Banerjee, Mohindro Lall Shome, and *Pearee Mohun Mookerjee* for Appellants.

Baboo Kishen Succa Mookerjee for Respondent.

A suit by one ryot against another for damages on account of illegal appropriation of the produce of the land, including the ryot's profits, by the defendant during certain years, is not a suit for mesne-profits, and is, therefore, unaffected by Section 11, Act XXIII. of 1861. The question regarding amount cannot be settled in execution, but by separate suit.

PLAINTIFF first brought a suit for possession with mesne-profits of certain land of which he had been dispossessed by the defendant, Joy Kishen Mookerjee.

The Courts gave him a decree for possession and wasilat for 1266. He now sues for what he calls the mesne-profits of 1267, 1268, and 1269, that is, from the date of the former decree to the date of his acquiring possession under it.

Both the Lower Courts gave plaintiff a decree, though the sum decreed by both Courts was not the same in amount.

The defendant now appeals specially, urging that the present separate suit for mesne-profits between the date of the previous decree and possession acquired under it will not lie; that the question regarding their amount should have been settled under Section 11, Act XXIII. of 1861, in execution, and not by separate suit; and that, consequently, the order of the Lower Courts should be reversed, and the plaintiff's suit dismissed with costs.

We do not look upon the present suit as one for mesne-profits at all. It is a suit by one ryot against another tenant for damages on account of the illegal appropriation of the produce of the land, including the ryot's profits by defendant during certain years, and it is measured at the value of that produce with certain deductions on account of expenses of cultivation. Such a suit, we think, is unaffected by the terms of Section 11, Act XXIII. of 1861; and though, doubtless, the words "mesne-profits" have been used incorrectly, such incorrect usage will not affect the plaintiff's right to bring an action of this nature. We see no reason, therefore, to interfere in special appeal, but reject the application with costs.

The 10th May 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Decision (Effect of, in one appeal by High Court on two others before Judge).

Case No. 3356 of 1864.

Special Appeal from a decision passed by the Judge of Dacca, dated the 22nd August 1864, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 28th December 1859.

Mr. G. Gregory, executor to the estate of Mr. Catherina Arratoon (Plaintiff), *Appellant,*

versus

Huree Kishore Roy and others (Defendants), *Respondents.*

Mr. C. Gregory and *Baboo Kalee Mohun Doss* for Appellant.

Baboos Kishen Kishore Ghose and *Hem Chunder Banerjee* for Respondents.

Of three suits by different parties against the same defendant, the appeal lay in one to the High Court, and in the other two to the Judge. The Judge postponed the two cases before him until the decision of the High Court, when, taking it as a precedent, he decided, accordingly, in favor of the defendant. HELD that the decision of the one case, though not strictly a pre-adjudication binding on the other two plaintiffs, was, nevertheless, a good guide to enable the Judge to arrive at a correct finding on the facts.

THREE cases brought by three parties claiming shares in the same land as against a neighbouring zemindar were tried together. In one, the amount being beyond the limit, the appeal lay to the High Court; in the two others, the appeal lay to the Judge. The two cases before the Judge were postponed to await the decision of the High Court; and, that being given in favor of the respondent, the Judge on that 'precedent' decided the other two cases in his favor. Strictly, the decision of one case was not a pre-adjudication binding in law on the other two claimants, as the Judge would seem to put it; but it would, on evidence, go so far to guide his finding on the facts, that we cannot doubt that practically his finding is right, and was meant to be a concurrent judgment on the facts, and that substantial justice does not require our interference. We dismiss the appeal with costs.

The 10th May 1865.

Present :

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Re-sale in execution of decree (consequent on non-deposit)—Liability of purchaser to damages—Appeal.

Case No. 126 of 1865.

Special Appeal from a decision passed by Mr. P. E. Taylor, Judge of East Burdwan, dated the 26th August 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 28th May 1864.

Sree Narain Mitter, *Appellant,*

versus

Maharajah Mahtab Chand Bahadoor and others, *Respondents.*

Baboo Prosunno Coomer Sein for Appellant.

Baboo Juggadanund Mookerjee for Respondents.

A purchaser at a sale in execution of a decree is liable for damages caused by a re-sale consequent on his not making the required deposit. An appeal lies to this Court from the order of the Lower Courts absolving the purchaser from liability.

The first Court disallowed the damages arising out of the re-sale (in which the property was sold *for less* than it had fetched in the first sale) on the ground that the mooktear of the purchaser had not made a deposit, and had not signed the proceedings of sale. The Lower Appellate Court upheld the order on the ground, that the provisions of Sections 253 and 254 had not been observed, and that there was some irregularity in the sale. It is shown to us from a copy of the petition of the purchaser that he admits that his mooktear had signed the sale proceedings. We know of no irregularity, and the sale was not set aside for any. The non-deposit of a portion of the consideration on the first day of the sale, and the remainder within the time allowed by law, led to the re-sale. It is clear that the fact of the deposit not being made cannot, as the Lower Courts think, absolve the purchaser from the liabilities attached to the purchase made for him by his mooktear. The contract was completed, and, if the purchaser fail to pay the consideration, a re-sale must take place, and the purchaser in the *first* sale must abide by the results of his acts in abandoning the purchase.

It is true, the law of 1861 allows an appeal in matters of dispute arising only between the parties; but Section 254 enacts that the damages payable by the first purchaser may be realized under the proceedings allowed for execution of decrees. It, therefore, follows that for all the purposes of enforcing payment of these damages, the original decree-holder has all the rights of a decree-holder to enforce his claim against the defaulting purchaser, and so appears to have a right to appeal in all matters appealable.

We think, therefore, that an appeal lies to this Court; and that may be the reason why no objection was taken by the purchaser to the appeal to the Lower Appellate Court. As the order of the Lower Court is evidently wrong, we reverse them with costs, and decree the appeal of the appellant, declaring that the appellant is entitled to recover the difference by way of damages.

A copy of this order is to be sent to the Court of first instance to enable the decree-holder to recover the sum adjudged to him by this order.

The 10th May 1865.

Present :

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Limitation—Acknowledgment of title of Mortgagor (made by Mortgagee to third party).

Case No. 118 of 1865.

Special Appeal from a decision passed by Moulvie Etrat Hossein, Principal Sudder Ameen of Sarun, dated the 18th November 1864, affirming a decision passed by the Moonsiff of that District, dated the 8th June 1864.

Dur Gopal Singh (Plaintiff), *Appellant,*

versus

Kasheeram Pandy and others (Defendants), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboos Madhub Chunder Banerjee and *Chunder Madhub Ghose* for Respondents.

A written acknowledgment by the mortgagee of the title of the mortgagor or of his right of redemption is

sufficient within the meaning of Clause 15, Section 1, Act XIV. of 1859, though made to a third party, and not to the person entitled to the land.

This suit, brought against a mortgagee for the recovery of the property mortgaged, is clearly barred by limitation, unless the written acknowledgment of title on which the plaintiff relies saves it. The acknowledgment is in terms a clear recognition of the plaintiff's right as mortgagor; but it is contained in a document (to which the plaintiff is not a party) whereby the mortgagee conveyed his interest in the land to a third person by way of mortgage. Act XIV. of 1859, Section 1, Clause 15, merely requires the acknowledgment of the title of the mortgagor or of his right of redemption to be given in writing by the mortgagee. The construction given to these words by the Court below is that they require the written acknowledgment of title to be given to the mortgagor; and that, in the present case, the acknowledgment, being in a writing passing between the mortgagee and a third person, is insufficient to prevent the operation of the Law of Limitation.

Whatever may be the requisites of an acknowledgment of a debt to revive a right of suit within the 4th Section of the Act, we are of opinion that an acknowledgment of title may be sufficient within the above Clause of the Act, although it is not made to the person entitled to the land.

After the prescribed period has elapsed, the mortgagor loses all remedy by suit, and the mortgagee consequently holds the land free from all rights of suit by the mortgagor. But if, before the expiration of the appointed time, the mortgagee makes known that he holds the land as a mortgagee, or, in other words, in a character incompatible with the notion that he is himself the owner, and if he makes this manifest by a writing acknowledging the title of the owner, the mortgagor, we find nothing in the law to require that such written acknowledgment should be addressed to the mortgagor. It appears to us that a public written acknowledgment of the mortgagor's title, or an acknowledgment such as that now before us, contained in a writing addressed to a third person, if signed by the mortgagee, satisfies the requirements of the law.

We reverse the decision of the Lower Court, and remand the suit for trial.

The 11th May 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Judgment of Lower Appellate Court (to record grounds of appeal and reasons for rejecting them).

Case No. 3433 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Mymensingh, dated the 27th August 1864, affirming a decision passed by the Moonsiff of that District, dated the 16th December 1861.

Kishen Chunder Putronovis (one of the Defendants), *Appellant,*

versus

Tara Monee Chowdhrain (Plaintiff), *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Bhuggobutty Churn Ghose for Respondent.

The grounds urged in a petition of appeal to a Lower Appellate Court, and the reasons for rejecting them, should be distinctly and concisely recorded by the Court.

THE only order passed in this case is in these words: "Whereas no reason is "shewn for entering this case again on the "file, it is ordered that the petition to that "effect be rejected." We think this order quite insufficient and most unsatisfactory. The grounds urged by the petitioner, and the *reasons* why these grounds are not tenable, should be distinctly and concisely recorded by the Principal Sudder Ameen. The attention of the Principal Sudder Ameen is directed to the decision of this Court, page 254, Weekly Reporter, 24th March 1865, No. 2905, special appeal from his decision, and he is enjoined to be more careful in future.

The 11th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Execution of decree—Suit by intervenor under Section 230, Act. VIII. of 1859—Transfer of land in dispute from one jurisdiction to another.

Case No. 3564 of 1864.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the

12th September 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 25th May 1864.

Kalee Doss Neogy (Plaintiff), *Appellant,*

versus

Huronath Roy Chowdhry, (Defendant), *Respondent.*

Baboos Sreenath Doss and *Romesh Chunder Mitter* for Appellant.

None for Respondent.

In a suit under Section 230, Act VIII. of 1859, brought by an intervenor, the Court ought to decide, as between the intervenor and the decree-holder, the questions arising under that Section, instead of dismissing the decree-holder's claim, and requiring him to take out execution of his decree, not in the district of M, but in the district of R, as the villages of which possession is claimed under the decree have, since the passing of the decree, been transferred from M to R. If, during the pendency of the execution case, the Court is deprived of jurisdiction, the Court should not dismiss the decree-holder's claim, but transfer the record to R.

This was a suit which arose under Section 230, Act VIII. of 1859, in execution of decree, when the respondent intervened. Both the Lower Courts have decided, as between the special appellant and the respondent, not the questions which can arise under Section 230, but that the plaintiff should take out execution of his decree, not in the district of Mymensingh, but in that of Rajshahye, as the villages, possession of which is claimed under the decree, have, since the passing of the decree, been transferred from Mymensingh to Rajshahye. It is quite clear that, when the application for execution was preferred to the Mymensingh Court, the jurisdiction then was with that Court. If, while the execution case was pending, the Court was deprived of jurisdiction, the Court should not dismiss the decree-holder's claim, but should transfer the record to Rajshahye. There seems to be some doubt as to whether the decree-holder will not be barred by limitation from executing his decree in the Rajshahye district. If so, the case should have been transferred, and not dismissed, and certainly no such order could be passed in a suit under Section 230 brought by an intervenor.

The Lower Court's order is reversed, and the case is remanded with directions that it may be transferred to the Rajshahye Court for execution, and for determination of the questions which arise on the intervenor's objections.

The 11th May 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Resumption of invalid Lakheraj—Amendment of plaint—Refusal of, and subsequent application for, remand.

Case No. 14 of 1864.

Regular Appeal from a decision passed by the Judge of Midnapore, dated the 8th October 1863.

Nobbo Lall Khan and another (Defendants), *Appellants,*

versus

Maharanee Odheeranee Narainee Koomaree (Plaintiff), *Respondent.*

Baboos Nobo Kishen Mookerjee and *Kalee Prosunno Dutt* for Appellants.

Mr. R. V. Doyne and *Baboo Juggadanund Mookerjee* for Respondent.

Suit laid at Rupees 21,494-14 annas 6 pie.

Suit under Section 30, Regulation II. of 1819, for resumption of invalid lakheraj created since the Permanent Settlement. The plaintiff was offered time and opportunity to amend his plaint and supplement his evidence. He refused the latter, and elected to go to trial on the record as it stood, when he failed to prove that the lands in dispute were at any time part of his permanently settled estate, and the Court then refused to remand the case in order to enable him to produce further evidence.

This was a suit to resume certain lands held rent-free, on the allegation that they were part and parcel of the plaintiff's permanently settled estate illegally alienated and held by the defendant as lakheraj since the Permanent Settlement.

The suit was brought under Section 30, Regulation II. of 1819, and the area sought to be resumed was in excess of one hundred beegahs.

After the Full Bench ruling in the cases of Sonaton Ghose and Heera Monee Dossee, and the judgment of the Divisional Bench in the case of Khelut Chunder Ghose (reported at page 258 of Sutherland's Weekly Reporter, Volume II.) in conformity with those rulings were passed, the vakeels for the plaintiff in this case were asked whether they wished to amend their plaint, and for that purpose have the case remanded to the Lower Court to enable them to produce evidence that the lands in suit were separated from the zemindaree subsequent to the Permanent Settlement, and that consequently the plaintiff was entitled to recover under Sec-

tion 10, Regulation XIX. of 1793. The plaintiff's Counsel refused the remand, and elected to amend the plaint in this Court by striking out the words "Section 30, Regulation II. of 1819," and to proceed to trial on the record as it stood.

The plaint then having been amended, the case before us is simply one brought under Section 10, Regulation XIX. of 1793, to recover possession of lands illegally alienated from the permanently settled estate belonging to the plaintiff some time subsequent to the Permanent Settlement. Under the late rulings, it is upon the plaintiff to prove his allegation that the lands in question did, at one time, form part of his estate. He has produced certain quinquennial and measurement papers. It is admitted that the measurement papers do not refer to these lands, and the quinquennial papers prove nothing. They merely comprise the names of certain villages with their area, assets, and jumma. No one denies that the villages mentioned in these papers belong to plaintiff's permanently settled estate; but beyond this the papers go to prove nothing in respect to the land in dispute in this case, whether it formed part of the assessed lands of these villages, and was permanently settled with plaintiff's predecessor. It is clear that the lands now held rent-free may be geographically situated within the limits of plaintiff's permanently settled villages, and yet compose no part of his estate; and the fact of their being so situated is not even *primâ facie* evidence that such lands did at one time form part of that estate. No such presumption arises. It is for plaintiff to prove his case as he amended it, and he has utterly failed even to stir it. It is now said that the oral evidence is in another case No. 42, which has not been sent. It is true that plaintiff, in his petition for review to the Judge, refers to a record bearing that number; but there is nothing in the Judge's proceedings to shew that he ever looked at that record, and the plaintiff cannot shew us that he did. Had the Judge done so, we think he could not have failed to make mention of it in his decision in this case.

We are now asked to remand the case to enable the plaintiff to produce the necessary evidence; and it is said that the defendant held in the double position of former proprietors of the zemindaree and of lakherajdar. Here again we have nothing but assertion; no proof that defendant held this double character is adduced, and the vakeels for the defendant, appellant, deny the allegation. It appears to us that the indulgence now asked for by the plaintiff's Counsel cannot be allowed. The plaintiff was offered by the Court time and opportunity to amend his plaint and supplement his evidence. He refused to do the latter, supposing, we presume, that he had sufficient evidence on the record to sustain his case, and he elected to go to trial on the record as it stood. Now that his case has completely broken down, he asks for permission to amend his shortcomings. This is mere trifling with the Court, and cannot be permitted. As plaintiff has failed to give any proof that the lands in dispute were at any time part of his permanently settled estate, we give a decree for the defendant, appellant, and, reversing the decree of the Court below, dismiss the plaintiff's suit with all costs.

The 11th May 1865.

Present:

The Hon'ble W. Morgan and G. Campbell, *Judges.*

Usufructuary Mortgage—Payments by Mortgagee on account of Revenue assessed on land pledged as Lakheraj.

Case No. 3611 of 1864.

Special Appeal from a decision passed by Mr. F. Tucker, Judge of Shahabad, dated the 28th September 1864, affirming a decision passed by the Sudder Ameen of that District, dated the 19th December 1863.

Nurjoon Sahoo (Defendant), *Appellant,*

versus

Shah Moozeerooddeen, and, after his death, Shah Kubeelooddeen (Plaintiff), *Respondent.*

Mr. C. Gregory for Appellant.

Messrs. A. F. Lingham and *J. Baptist* and *Moonshee Ameer Ali* for Respondent.

An usufructuary mortgagee to whom was pledged, as lakheraj, land which was not valid lakheraj, and which has since been assessed with revenue, is entitled to a lien against the mortgagor for sums of money paid by the former in discharge of the public revenue.

According to the zur-i-peshgee security, the land would remain in the mortgagee's possession until the principal sum borrowed was paid down by the mortgagor. There is no stipulation respecting interest. The question before us is, whether the mortgagor is entitled to redeem on tender of the prin-

cipal alone under the special circumstances of this case. The rule concerning redemption on tender of the principal money, which is contained in Regulation I. of 1798, Section 2, is, by the terms of that law, applicable only to a loan of money on *bye-bill-wuffa* or conditional sale. But it has also been understood to apply to usufructuary mortgages like this, and its application to the present case has not been disputed. The land, which is the subject of this zur-i-peshgee security, was supposed to be lakheraj land when the security was given, but was afterwards assessed with revenue by the Government. The mortgagee, being in possession, has, for many years past and ever since that assessment, paid the Government revenue; and he now claims a lien on the land for the money so paid, which he insists ought to prevail over the plaintiff's right, under the ordinary mortgage law, to obtain redemption of the security on payment of the principal alone. Where the property mortgaged is, at the time of the mortgage, land paying revenue to the Government, the mortgagee takes subject to the charge, and the mortgagor intends only to pledge the land and its annual profit as they exist after this annual charge has been satisfied. In such cases the mortgagee in possession pays the revenue, and his payments are afterwards credited to him when the mortgage accounts are adjusted. But the defendant in this suit received the land pledged to him, subject to no such obligation. On the contrary, at the time of the loan, it was taken for granted on both sides that the land pledged was lakheraj, and it is by the subsequent unforeseen act of the Government in subjecting it to assessment that an obligation to pay first arises.

Ordinarily the law gives to a person interested in land a lien against the defaulting owner for sums of money paid by the former in discharge of the public revenue. The payments made by the defendant appear to us to entitle him to a lien within this principle. His equitable claim to such protection is certainly not diminished in this case by the fact that the plaintiff has pledged to him, as lakheraj, land which was not valid lakheraj, and has now been actually assessed with revenue; nor can the plaintiff contend that the annual receipts from the land, which, when it passed into the defendants' hands, were clearly to be appropriated solely to the defendant's use subject to the mortgagor's right to an account), became subsequently bound for the mortgagor's benefit, although in violation of his express agreement to discharge his estate from the lien of the person who actually paid the revenue. This right is, we think, sufficient to qualify the otherwise undoubted right of the mortgagor to redeem his land on payment of the principal alone. If we gave effect to the latter right in the present suit, we should, in the probable event of the mortgagor requiring no accounts of the mortgagee's receipts while in possession, leave only to the mortgagee a doubtful remedy by suit for the money which he has paid, a great portion of which would be met by setting up the Law of Limitation as a defence.

We reverse the judgment of the Lower Courts, and decree this appeal with costs.

The 12th May 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Limitation—Survey award and Compromise—Joint undivided estate—Notice.

Case No. 3516 of 1864.

Special Appeal from a decision passed by the Judge of Dacca, dated the 3rd September 1864, affirming a decision passed by the Moonsiff of that District, dated the 28th March 1864.

Hur Lal Roy (one of the Defendants), *Appellant.*

versus

Sooruj Narain Roy and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboos Prosunno Coomar Sein and *Lulleet Mohun Sein* for Appellant.

Baboo Judoonath Mookerjee for Respondents.

A co-proprietor of a joint undivided estate is bound by a survey award and compromise to which the other joint proprietors were parties, where notice of the survey proceedings was served on the proprietors jointly, and not on him individually.

In this case the plea taken in special appeal is that the Lower Appellate Court is wrong in holding that the special respondent is not barred by the special Law of Limitation, on the ground that he was not a party to an award of the survey authorities, and to a compromise resulting from that

award; and it is further pleaded by special appellant that, as special respondent had knowledge of the award and compromise, he is as liable to be barred by limitation as if he had been present, and thus were fully a party to the award and compromise.

It is admitted by special respondent that there was a survey award and a notice to other co-parceners of the estate as to the survey proceedings; but special respondent urges that no notice was given to *him individually;* that, as he was not present, and thus no party to the award and compromise, he cannot be bound by them; and he adds that the knowledge of his co-parceners does not prove *his* cognizance, even if such cognizance were sufficient, which he denies.

We observe that plaintiff sued in this case for two plots of land; and that both Lower Courts have found as a fact, based on entire absence of proof of plaintiff's possession for more than 12 years before suit, that he is barred by the general Law of Limitation.

As to the *second plot*, the Lower Appellate Court holds that, as the plaintiff was not a party to the survey award, nor had knowledge of the compromise, he is not barred by the special Law of Limitation.

We think that, under the facts of this case, the Lower Appellate Court is wrong upon this latter point.

It is admitted by special respondent that the estate is a *joint undivided estate;* that *notice* of the survey proceedings was *served* on the *joint proprietors* of that estate, though not *individually* upon special respondent, plaintiff; and that there was a survey award and a compromise to which the other joint proprietors were parties.

Under such a state of facts, we think that, as there was notice to the joint proprietors of the estate, of whom plaintiff was one, of the survey *proceedings*, plaintiff is bound by any award or compromise made on these survey proceedings, or as the result of them, and *this* absentee plaintiff was by that notice made a party to these proceedings, and had opportunity to attend and act. Plaintiff, however, failed to attend and act, and the award and compromise thus affect him as a joint *ex-parte* decree after due notice would do.

We, therefore, come to the conclusion that plaintiff is in this case bound by the special Law of Limitation as much as those who directly were parties to the award and compromise.

We accordingly decree this special appeal with costs, reversing the decision of the Lower Appellate Court.

The 13th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Limitation—Minors—Suit to set aside order rejecting claim to attached property.

Case No. 3582 of 1864.

Special Appeal from a decision passed by the Judge of Mymensing, dated the 10th September 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 1st June 1864.

Huro Soonduree Chowdhrain and others (Defendants), *Appellants,*

versus

Anundnath Roy Chowdhry (Plaintiff), *Respondent.*

Baboos Sreenath Doss and *Romesh Chunder Mitter* for Appellants.

Baboos Onoocool Chunder Mookerjee and *Dwarkanath Mitter* for Respondent.

A person may sue, within a year of his majority, to set aside an order passed under Section 246, Act VIII. of 1859, rejecting an application made by a "well-wisher" with his consent to stop the sale of certain lands attached in execution of a decree during his minority.

SPECIAL respondent (plaintiff in the Courts below) sued to set aside an order of the Civil Court under Section 246 of Act VIII. of 1859, by which his application, to stop the sale of certain lands attached in execution of a decree obtained by the special appellant, was rejected.

The decree was against Juggdessuree, the adoptive mother of the special respondent, and was, as he alleges, against her personally, and not as representative of her deceased husband's estate.

The property attached by the judgment-creditor was part of the estate to which special respondent succeeded as adopted son, and he objected to its being sold in satisfaction of a personal debt of Juggdessuree's.

For the purchaser (special appellant) it was urged that the suit, not having been brought within one year from the date of the order rejecting the application for release, was barred by limitation, and that the debt was one chargeable on the estate.

It appears from the record that the original order of the Moonsiff, rejecting the application, was reversed by the Judge, although no appeal was preferred to him;

but that order was in its turn set aside by the Sudder Dewanny Adawlut, which quashed the Judge's order, as being without jurisdiction, under Section 246 of the Civil Code, and restored that of the first Court.

The Principal Sudder Ameen in this case over-ruled the plea of limitation, on the ground that the period of one year should be counted from the order of the Sudder Court, and not from that of the Moonsiff. On the merits, he held that the debt was personal to Juggdessuree, and that the estate was not liable.

The Judge, on appeal, also considered that the suit was not barred, but for different reasons. He held that the special respondent had sued within one year after his attaining majority, and was, therefore, in time. On the merits, he agreed with the Principal Sudder Ameen.

The points taken in special appeal are:—

First.—That the limitation period of one year must count from the date of the first order, and that the Judge has decided the question of the special respondent's majority without any evidence; and

Second.—That he has misconstrued the decree against Juggdessuree, and wrongly supposed the debt to be one personal to her, and for which the estate is not liable.

With regard to the *first* objection, we think that, unless, under special circumstances, the date from which the year's limitation would run would be that of the original order, and that, unless such special circumstances be established in this case, the special respondent would be out of time; for the Judge's order, reversing that of the Court of first instance, was quashed by the Sudder Dewanny Adawlut as being altogether without jurisdiction, and the only order left was that of the Moonsiff. But we see no reason why the special respondent should be refused the privilege accorded by Section 11 of Act XIV. of 1859. That the special respondent was a minor when proceedings were first instituted, and that he has now sued within a year after his attainment of majority, are facts found by the Judge on evidence; and with them, however weak the evidence might be, we could not interfere in special appeal. It is contended, indeed, by the other side, that Section 246 of Act VIII. cannot be referred to Act XIV. of 1859, Section 11; but this appears to us a mistake. There is nothing prohibitory in the wording of the law itself; and, were the special appellant's argument correct, grievous injustice might be done to minors, whose estates might be absolutely lost to them by the action of limitation, through the neglect of their guardians to sue. We are clearly of opinion that Section 11 of Act XIV. will apply to and modify Section 246 of the Civil Code in this matter; and that a minor, on attaining full age, may sue, as in the present case, within a year of his majority, his guardian's laches notwithstanding.

And, in the present case, there is another reason why the special respondent should not be barred. The original application appears to have been made by a "Khair Khan," or well-wisher, as he is termed. There is nothing to show that this application was made with the minor's consent or approval, and no reason is given for the silence of the guardian. In any case, even if we admit that the minor would be compromised by a "well-wisher's" acts, it can only be on the supposition that those acts were advantageous to him; and if the "well-wisher," after setting the affair in motion, took no other steps, we see no reason why the minor, when he attained the legal power to sue, should not come forward and supply the omission.

On this issue, therefore, we think that the Judge was right in law in applying Section 11 of Act XIV. to Section 246 of the Civil Code, and that the proceedings taken by the "well-wisher" were no bar to the special respondent's suing for himself after he attained majority.

With regard to the *second* objection, we think that the liability was personal to Juggdessuree. It appears from the decree that this person, a Hindoo widow, at that time childless, though with a permission to adopt, sold part of her deceased husband's estate on the ground of necessity such as would legalize the alienation. The purchaser sued for possession, and was met by Juggdessuree, not by the plea that the sale was false, or that she had no power to make it, but that the land claimed was not that sold, and that the former belonged to a separate talook. It appears to us that this was a false defence set up for the widow's private benefit, and that she only should be made to bear its consequences. Moreover, the decree against her was executed for the costs only. The land was recovered by the purchaser, and the only money-claim that remained was the costs; and as these costs were incurred by the widow on account of her denying what the Court held to be a just claim, and by her refusing to give up

land which she had either rightly or wrongly sold on the false pretence that the land sued for was not that land, we think it would be unfair to charge the estate with the burthen, or to make the adopted son suffer for an act which had nothing whatever to do with the estate, and which was not done for his benefit, but for that of his adoptive mother, Juggdessuree

We, therefore, dismiss this special appeal with costs.

The 13th May 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Benamee sale—Bona fide purchaser—Subsequent sale by heir of benameedar—Sale by minor.

Case No. 3687 of 1864.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 29th September 1864, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 23rd May 1864.

Mr. L. Rennie (Plaintiff), *Appellant,*

versus

Gunga Narain Chowdry (Defendant), *Respondent.*

Baboos Mohendro Lal Shome and *Debendro Narain Bose* for Appellant.

Baboo Onoocool Chunder Mookerjee for Respondent.

A vendee, who purchases for valuable consideration and without notice of *benamee* from the ostensible owner of the property held by him under an apparently good title, will be protected from subsequent acts of the owner or his heir, both of whom were parties to the fraud ; and his purchase will hold good against any subsequent sale made by them.

A purchase from a minor is not *ipso facto* invalid.

THE plaintiff in this suit (special appellant before us) sued for confirmation of his possession in an 8-annas share of certain lands by cancelment of a summary order passed by the Collector, by which the special respondent's name was entered in the mutation register as owner of a 10-annas share of those lands. The relief sought extended, of course, only to the 8-annas share. The registry of the remaining 2-annas share in the name of the special respondent was not contested.

It appears from the record, and it will be as well to explain the state of matters between the parties *in extenso*, that the entire estate, 16 annas that is, was originally held by one Bydnath. He had two sons, Kaleenath and Golucknath; the former left a widow named Shunkuree, who, on her husband's death, remained in joint possession with Golucknath, in whose name the entire estate was registered in the Collector's Books.

These two proprietors, Shunkuree and Golucknath, gave a 4-annas share of the estate to Bhyrubee Debia, Golucknath's mother; and Golucknath sold his remaining interest, *viz.*, 6 annas, to Ram Mohun Kandoo, who had his name registered for that share as a separate talook, bearing a jumma of 68 rupees.

Shunkuree gave 2 annas of her share to Manoda, the brother of her co-sharer, Golucknath, and sold her remaining interest, *viz.*, 4 annas, to Ooma Churn and Doorga Churn, her husband and brother-in-law.

Bhyrubee, Golucknath's mother, gave the 4-annas share, which had been given to her by her son and Shunkuree, to Shib Chunder, who sold it to Manoda.

So that Manoda became seized of a 6-annas share: 4 annas by purchase and 2 annas by gift.

Of this 6 annas, the special appellant alleges that he purchased 5 annas on the 7th of Jeit 1264 B. S. He also bought from Ram Mohun Kandoo 3 annas of his share of 6 annas, thus becoming possessed in all of an 8-annas share in the estate.

He also, as it is alleged, got ijaras of 5 annas more; but this is not a point that requires consideration in this case.

Special appellant goes on to say that the special respondent, on the allegation that Huro Soondureee, widow of Golucknath, had sold to him a 10-annas share of the property, effected registration of his name in the Collector's Books, the special appellant's objection notwithstanding ; and it is this registration, at least so far as regards the 8-annas share purchased by him, that the plaintiff sued to set beside.

Special respondent's story is that Golucknath owned the entire 16 annas of the estate; that he sold a 6-annas share to Ram Mohun Kandoo; and in order to save the remaining 10 annas, which had been attached in execution of decree, caused his mother, Bhyrubee, and his brother's widow, Shunkuree, to file objections to the sale, the one for 4 annas, and the other for 6 annas, on the ground that the property was not Golucknath's, but their own. This fraud succeeded, and the shares were released from attachment.

The special respondent admits all the alienations set forth on the record, but avers that they were all *benamee* and fictitious sales, and that Golucknath was always the real owner of the property which, on his death, went to his widow Huro Soonduree, who in her turn sold it to special respondent.

We have thought it right to go into the pleadings somewhat in detail, in order to a correct understanding of the complicated questions involved.

The Court of first instance decreed the plaintiff's (special appellant's) claim to the 8-annas share, on the ground that his *bonâ fide* purchase was proved, and that, whether *benamee* or not, the vendors were in possession of the property sold at the time of the transfer.

But the Judge reversed this order, holding that all the prior sales were benamee and fictitious, and that the real owner had sold the property to the special respondent. He did not make any order regarding the 3 annas alleged to have been purchased from Ram Mohun Kandoo, and which special respondent did not claim.

It is urged in special appeal that the special appellant, being a *bonâ fide* purchaser for a valuable consideration without notice, cannot be affected by any subsequent sale of the property effected by the heir of the *benameedars*.

We think that this objection must be allowed. The Judge has found, as a fact, that all the different transfers by Golucknath were fictitious; that in reality nothing passed under those sales; and that Golucknath was the owner of the property up to the time of his death. This is a finding of fact with which we cannot interfere; nor are we disposed to think that, under the circumstances disclosed in the record, the Judge was not fully justified in coming to such a conclusion. But in deciding on the fraudulent nature of these conveyances, he has altogether omitted to consider the special appellant's position. The special respondent has been allowed to retain possession of his purchase on the ground that it was *bonâ fide*, and that his vendor, notwithstanding that she was a party to the fraudulent transfer above alluded to, was at the time of sale the real owner; but he has altogether overlooked that the special appellant might have acted equally *bonâ fide*, and have supposed all along that he was purchasing from the real owners.

We are of opinion that, if a vendee purchases for a valuable consideration, and without notice of the *benamee*, from one who, in the eyes of the world, is the absolute owner of a property, and who holds that property, to all appearances, under a good and sufficient title, he would be protected from the subsequent acts of the real owner or of his heir, both of whom were parties to the fraud; and that his purchase would hold good against any subsequent sale made by them. The defect in the title was a latent one, which the special appellant could not, by any reasonable enquiry, have discovered; and the party who assisted in deceiving him cannot now take advantage of his own fraud, and sell to another what has already been made over for value to the original purchaser.

The Judge alludes to the fact that the special appellant purchased from a minor, as if that fact told against his claim. It is urged by the special respondent that the Judge thereby intended to throw some doubt on the validity of the plaintiff's purchase; but a purchase from a minor is not *ipso facto* invalid; and, therefore, if this was in the learned Judge's mind, he is in error here also.

The case must, therefore, be remanded to the Judge to find whether the special appellant did or did not buy the property *bonâ fide* for a valuable consideration, without notice of the *benamee*; if this point be found in his favor, we think that he would have a good title against the special respondent.

With regard to the 3 annas share alleged to have been bought by the special appellant from Ram Mohun Kandoo, we do not see that the Judge has considered the point. The special respondent admits that Ram Mohun was the purchaser of a 6-annas share from Golucknath, so that there would seem to be no reason why the special appelland should not, in any case, recover so much of his claim.

The Judge will take up this point also on the remand, and pass a fresh decision on the entire claim with reference to the above remarks.

Costs will follow the result.

The 13th May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Limitation—Adverse possession.

Cases Nos. 3667 and 3668 of 1864.

Special Appeals from a decision passed by the Judge of East Burdwan, dated the 11th July 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 13th June 1863.

Biressur Banerjee (Defendant), *Appellant,*

versus

Onooda Churn Banerjee (Plaintiff), *Respondent.*

Baboos Gopal Lall Mitter and *Banee Madhub Banerjee* for Appellant.

Baboo Dwarkanath Mitter for Respondent.

A died leaving *B* his mother and *C* his sister. *B* kept possession of his property until her death, when *C* took it, and remained in possession until her death. When *C* died, *D*, a collateral heir of *A*, took possession. The plaintiffs, the co-heirs with *D* of *A*, sued for their share of the property. HELD that *C's* possession was adverse to the plaintiffs, and that their cause of action accrued on *B's* death.

IT is admitted by all parties that the decision of this Court in 3667 of 1864 must govern 3668 of 1864.

In 3667 of 1864, the facts may be concisely stated as follow: Some considerable time ago one Kaleenath died, leaving a mother, Kripa Moyee, and a sister, Huro Soonduree, but no child or widow him surviving. Kripa Moyee took possession of his property, and retained it until her death in 1235, when Huro Soonduree took it, and remained in possession of it until she died.

When Huro Soonduree died, her husband's son by a co-wife attempted to take possession of this property; but the defendant in this suit, Biressur, claiming to be collateral heir of Kaleenath, recovered it from the trespasser.

The plaintiffs in the present suit are third cousins of Biressur, and stand in the same relation to Kaleenath as he does; therefore they are co-heirs with him of Kaleenath.

Under these circumstances, this suit is brought to recover from Biressur the plaintiff's share (as co-heirs with him of Kaleenath) of the property originally belonging to Kaleenath, which he recovered in the suit above mentioned.

Amongst other things, the defendant pleads limitation of time. Both Courts below over-ruled this plea, and, on the merits, decreed in favor of the plaintiffs.

On special appeal to this Court, it is urged by the defendants that the plaintiff's cause of action first accrued on Kripa Moyee's death, which is admitted to have occurred more than 12 years before the institution of this suit, and that the Lower Appellate Court has come to the conclusion that Huro Soonduree's possession was not adverse on legally insufficient evidence.

On the part of the plaintiffs it is urged that the Lower Appellate Court was right in treating Huro Soonduree's possession as not adverse to the plaintiff's, and, that being so, the plaintiff's cause of action did not arise before her death, which admittedly took place within the period of limitation. Also that, even if the Lower Appellate Court was wrong in this, the recovery of the property by Biressur, as heir of Kaleenath, must enure to the benefit of his co-heirs; and consequently the plaintiff's cause of action first accrued after this when Biressur set up an adverse title to him.

It is not contended before us that Biressur, in his suit for the land, in any way pretended to seek its recovery on behalf of any other person than himself, or even that he then knew of the existence of his co-heirs; and we are of opinion that the recovery of the property by him in that suit did not affect the running of the time against the plaintiffs.

Next, as to the character in which Huro Soonduree held the property in question, we think that possession of property must always be attributed to a right to the property of the largest possible kind on the part of the person possessing it, until it be shewn either that the possessory right really is in another person, and that the present enjoyment is by his permission, or that the possession, although of right, is so under some limited right to the property. Consequently we think that Huro Soonduree's possession must, *primâ facie*, be presumed to be of right in herself, and adverse to all the world; and we do not learn from the record, or from the judgment of the Lower Appellate Court, that there was any evidence whatever before the Court to rebut this presumption, except the alleged admissions of the defendant made in the plaint filed in the suit already referred to as brought by him for the recovery of the property. All the other considerations by which the Lower Appellate Court supported its judgment appear to us to be pure speculations as to the possible conduct of parties under a different condition of circumstances.

On referring to the plaint in the suit in question, we find that the present defendant then stated that he was the head of the family; that he and his mother and Huro Soonduree lived in commensality; and that Huro Soonduree was allowed by himself and his mother to have possession of property during her life. This may be very good evidence against the defendant if such were needed to show that Huro Soonduree's holding was not adverse to him; but it can be no evidence in favor of the plaintiff, because the defendant might, during the whole time, have been himself holding adversely to the plaintiff, and, in fact, was so from and after the time of bringing the suit, because he therein distinctly asserted himself to be sole heir, and recovered the property in that character.

We are, therefore, of opinion that there is in this case no evidence to rebut the presumption that Huro Soonduree's possession was adverse to the plaintiffs; and as their right to recover the property accrued on Kreepa Moyee's death, and as nothing has since occurred to prevent time from running against them, the Lower Appellate Court was wrong in law in saying that the plaintiff was not barred by limitation: its judgment on the preliminary issue must, therefore, be reversed. The decree must be in favor of the defendants with all costs, in both the suits under special appeal before us.

The 13th May 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Limitation (Act XIV. of 1859)—Mesne-profits—Possession of land—Deduction.

Case No. 13 of 1865.

Regular Appeal from a decision passed by the Judge of Beerbhoom, dated the 19th September 1864.

Baboo Issureenund Dutt Jha (Plaintiff), *Appellant,*

versus

Parbutty Churn Jha and others (Defendants), *Respondents.*

Baboo Juggadanund Mookerjee for Appellant.

Baboos Dwarkanath Mitter and *Unnoda Pershad Banerjee* for Respondents.

Suit laid at Rupees 23,280-8 as.

Six years is the period of limitation prescribed by Act XIV. of 1859 for suits for mesne-profits, and 12 years for suits for possession of land.

In a suit for mesne-profits, Act XIV. allows no deduction for the pendency of the suit for possession. The only deduction which that Act allows is for the pendency of a suit not adjudged on its merits owing to some objection as to jurisdiction, &c.

THE appellant argues that, in this case (brought by him after the passing of Act VIII. of 1859) to obtain wasilat of certain lands during dispossession after he had sued for and obtained possession of the lands in a separate suit, the cause of action arose from the date of the decree in the former suit; and that the limitation for such a claim, under the new law, is twelve and not six years.

In support of his argument, the pleader quotes a decision in case No. 316 of 1863 of a Divisional Bench of two Judges, dated 22nd February 1864. We find, however, that, in a Full Bench decision of five Judges in a suit brought before Act VIII. of 1859, it was decided on the 2nd of April 1864, that the cause of action in such cases does not arise from the date of the previous decree for possession; but that, under the old Law of Limitation, before Act XIV. of 1859 came into operation, the plaintiff was entitled, in calculating the period of limitation, to a deduction of the period during which the claim for possession was pending in Court.

The Limitation Law is now changed; and no deduction is allowed to a plaintiff, except for the period during which another suit for the same right was pending in other Courts, in case the first action was not ultimately adjudged on its merits, owing to some objection of jurisdiction, &c. The suit for possession being, as a matter of course, separate from the present suit for mesne-profits, and having been adjudged on the merits, no deduction can be allowed in this case for the period that the first suit was pending. The claim for wasilat has also, by the new law, been made subject to limitation of six years instead of twelve, though that period is still allowed for suits for possession of land. The law on the point is explained in two decisions of the High Court, reported in Volume I. of the Weekly Reporter, pages 65, 83, and 84.

The Judge below having rightly applied limitation to the suit, we reject this appeal with costs.

The 15th May 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Suit for enhancement by Auction-purchaser (before Act X. of 1859)—Uniform payment by Ryot before Decennial Settlement—Onus probandi.

Case No. 551 of 1865.

Special Appeal from a decision passed by the Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen of Furreedpore, in Dacca, dated the 24th December 1864, affirming a decision passed by the Moonsiff of that District, dated the 31st December 1861.

Showdaminee Dossia (Plaintiff), *Appellant,*

versus

Gooroo Pershad Dutt and others (Defendants), *Respondents.*

Baboos Mohinee Mohun Roy and *Chunder Madhub Ghose* for Appellant.

None for Respondents.

In a suit for enhancement brought by an auction-purchaser before Act X. of 1859, the ryot cannot avail himself of the presumption arising under Section 4 of that Act from a uniform payment for 20 years, but must prove uniform payment for 12 years before the Decennial Settlement. Notwithstanding proof of such payment, he will still be liable to enhancement in respect of lands held by him in excess of the quantity mentioned in his lease.

THIS suit having been instituted before Act X. of 1859 came into operation, and therefore not being a case under that Act, the presumption arising under Section 5 of the law from a uniform payment for twenty years does not apply to this case.

The findings of the Lower Appellate Court are not sufficient to debar the special appellant from obtaining a decree for enhancement against the defendant. The ryot must show that the lands have paid a uniform amount of rent from a time 12 years prior to the Decennial Settlement, before he can successfully answer the claim of enhancement at Pergunnah rates brought against him by a plaintiff claiming to be an auction-purchaser. Even, if the defendant had succeeded in establishing such a payment, he would still be liable for the rents of the lands said to be held by him in excess of the quantity originally leased out, and for which he was hitherto paying.

The case is, therefore, remanded to the Lower Appellate Court to ascertain whether the plaintiff is an auction-purchaser entitled to enhance at Pergunnah rates under the laws in force before Act X. of 1859 came into operation, and to find out from what times what rents have been paid for the tenure, what was the quantity of land originally leased out, what quantity of it has been since taken away for public purposes, and how much at present the defendant holds in excess of the remainder of the original quantity. It will then proceed to fix what is the proper Pergunnah rate of rents for the whole of the lands held by the defendant, or, as the case may be, of the quantity that he may be found to hold in excess of the original quantity leased out, *minus* the lands taken for public purposes.

The 15th May 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Adoption—Sale by Widow—Judgment on permission to adopt, and on adoption and legitimacy, is a Judgment in rem.

Case No. 292 of 1864.

Regular Appeal from a decision passed by the Judge of Moorshedabad, dated the 18th June 1864.

Rajkristo Roy (Defendant), *Appellant,*

versus

Kishoree Mohun Mojoomdar (Plaintiff), *Respondent.*

Messrs. R. V. Doyne, G. C. Paul, and *R. T. Allan,* and *Baboos Kishen Kishore Ghose, Dwarkanath Mitter, Onoocool Chunder Mookerjee, Ashootosh Dhur,* and *Umbica Churn Banerjee* for Appellant.

Baboos Sreenath Doss and *Unnoda Pershad Banerjee* for Respondent.

Suit laid at Rupees 21,045-8-10-2.

An adopted son is not actually precluded from ever *questioning* acts done by his mother during his minority or before his adoption, in the same manner as any other reversioner might question such acts. Yet a sale by a widow, with the consent of all legal heirs at the time existing, and ratified by decrees of Courts, is binding on reversioners as well as on an adopted son adopted long after the sale.

A matter of adoption and legitimacy or the like decided by one Court should be considered settled and not open to question in another Court, unless the opposing party, on whom lies the burden

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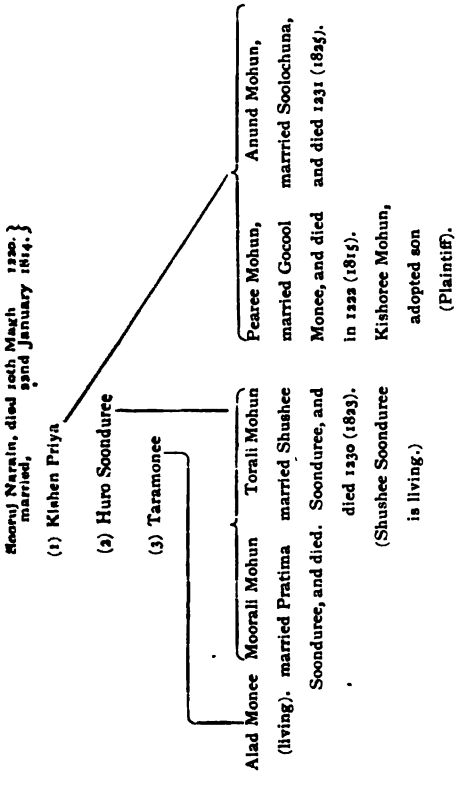
of setting aside the adoption, can show by clear and conclusive evidence that there has been fraud or collusion.

THIS is a remanded case, and there has been previous litigation between the representatives of the parties, which renders it necessary to state the facts in dispute at some length.

The defendant is the representative of a purchaser of 8 annas of a valuable mehal, called Manushmora, &c., and lot Kholahatee, &c., bearing a sudder jummah of 7,850 rupees.

The position of the plaintiff and of his family is shown by the annexed family tree :—



By a supplemental plaint, the plaintiff corrected the date of his father's death, and placed it, not in 1223, as at first, but in 1222.

We must observe here that the written statement of the plaintiff was not drawn up in accordance with Act VIII. of 1859. Instead of being a statement of the plaintiff's own case, and a simple narrative of the facts, as prescribed by Section 123 of Act VIII., it was an argumentative reply to the written statement of the defendant. This was wholly irregular, and should not have been permitted by the Court.

The defendant's statement was to the effect that his father, the late Nursingh Roy, had obtained possession of the property claimed under a mortgage, which, in a suit between him and Gocool Monee, mother of the plaintiff, and others, had been confirmed to him by decree of Courts on the 4th August 1829 and on the 20th of July 1833. The defendant pleaded limitation and other points, which will be fully noticed hereafter.

On the 11th of June 1862, the Judge, Mr. A. E. Russell, dismissed the claim of the plaintiff, holding that the decisions relied on by the defendant in cases in which the plaintiff was represented by his adopting mother showed the mortgage to have been contracted for the joint debts of the family, and proved the common ancestor, Sooruj Narain, to have died heavily indebted. In short, the Judge appears to have entered fairly in the case, and to have treated the claim as *res judicata*.

The case was appealed after an ineffectual attempt to get the Judge to review his decision; and the High Court (Justices Norman and Kemp) held, on the 19th of June 1863, that the plaintiff was estopped as to the share which he claimed in right of Moorali Mohun, but was not estopped in regard to the share which he claimed in right of Pearee Mohun, his adopting father, although the Court admitted that the former decision might be a strong piece of evidence against him. There is something not quite clear to us in the reasoning of the Court on remand; but the case was remanded for trial on the merits, and this has enabled us to enter fully into the whole matter, with the consent of both parties who have, in argument, left no point unenquired into.

On remand, a fresh Judge, Mr. W. B. Buckle, entering fully into the matter, and reciting the previous litigation, has come to the following conclusions. The Judge finds that the suit is not barred by limitation; that the adoption of the plaintiff is good and valid; and that the same has been recognized by decisions of the Courts of zillah Dinagepore in 1858 and 1859; that the plaintiff has sued within time, as he did not reach his majority until 1260; that the plaintiff, claiming not as heir of Gocool Monee, but of Pearee Mohun, is not barred by the decisions of the Provincial and the Sudder Courts of 1829 and 1833; and that he has a right to his share, as claimed, of 4 annas, with mesne-profits from 1222 to 1259.

The claim of the appellant to have the judgment reversed has now been very fully

argued by Mr. Doyne, who has reviewed the whole history of that litigation as well as the limited amount of evidence produced, and who raised the following points in favor of his client :—

1. The plaintiff has not shown that he has sued within 12 years after the attainment of his majority, for he has never stated in what month of 1260 he became of age; and he has no evidence on this head, save the decisions of the Dinagepore Court, which are not conclusive.

2. Even if he could make out the above point satisfactorily, limitation by the laches of the mother has affected his claim. More than 12 years have elapsed between the death of the father in 1814 (1222) and the act of adoption in 1250.

3. The permission to adopt has not been proved, there being no evidence of the same unless the decisions of the Dinagepore Courts are taken as evidence, which they are not.

4. The former judgment in the mortgage case, though not an estoppel as a *judgment in rem*, is a judgment in a case where the plaintiff was represented, and is binding on him. Even in the lowest point of view, it is a strong piece of evidence which the plaintiff cannot get over, and which he has not rebutted.

5. A sale by a widow, with the consent of all legal heirs at the time existing, would be binding on reversioners, and is binding on the plaintiff in this suit.

The previous decisions bearing on the litigation of the whole case as between the parties are given here in the margin.

Provincial Court, 4th August 1849.
S. D. A., 20th August 1833.
Principal Sudder Ameen of Moorshedabad, 29th of April 1848.
Ditto Judge, 31st of December 1850.
S. D. A., 23rd June 1852.
Principal Sudder Ameen of Dinagepore, 7th July 1858.
Ditto Judge, 18th June 1859.
S. D. A., 26th November 1860.

The decisions referred to as shewing the law on similar cases are also here given in the margin.

Boulnois, page 70, Shib Chunder Doss *vs.* Shib Kissen Banerjee.
Weekly Reporter—P. C. Case No. 12, April 1865.
S. D. A., Bamun Doss Mookerjee, page 583, of 1850; also Moore's Reports, same case, Vol. VIII., page 169.
Boulnois, page 120, No. II.
Taylor on Evidence, pages 1110-1098, Volume II.
S. D. A., page 596-1856.
Vyavashta Durpun, page 1040.

The case was argued for the respondent by Baboos Unnoda Pershad Banerjee and Sreenath Doss, as well as the whole law of the case and the various precedents quoted by both sides. We are enabled to pronounce the following judgment on all the points taken up *seriatim*.

On the first point, we observe that the plaintiff has never at any time stated in what month of the year 1860 he came of age, nor has he produced in this case any oral or documentary evidence to prove the date of his majority. What he, as well as the Judge who decreed his claim, have relied on is a decision by another Court in a case in which the plaintiff sued one Jugunnath Pershad Roy.

The Judge treats this case, as we understand him, as a judgment *in rem*, settling against all the world the date of the plaintiff's attainment of his majority. On referring to that judgment, we find that it is based on the neglect of the defendant to prove limitation against the plaintiff, and is otherwise supported by very illogical and inconclusive grounds. Moreover, neither in that judgment nor in any other part of this record is there any evidence to show when the plaintiff reached his majority. The judgment itself relied on in reality settles nothing except that the defendant in the case had not proved limitation against the plaintiff, which he was not bound to do. We hold, therefore, that the precise date of the majority is practically an open question to this hour.

As regards an earlier case, that of 1848, decided by the Principal Sudder Ameen, and then appealed to the Judge in 1850, we find that the mother of the plaintiff then said he was 11 years of age, while the opposite party alleged him to be 16. But the truth or falsehood of these statements was never judicially decided; and, as we have said, there is, in fact, no finding by any competent Court, through the whole of the litigation, as to the date of the birth, or of the attainment of majority, of the plaintiff.

On the other hand, we observe that this point was never formally put in issue, when the case went before the Judge in 1862; nor was it made one of the grounds of appeal to the High Court in 1863, when the case was remanded. Practically the case has been treated as if the plaintiff had come of age at some time during 1260, and we may observe that he would have been in time had he come of age earlier, or in 1258.

On the whole, however, it is not necessary for us to decide the case on this point. Did we think the decision would be affected by it, we should call on the plaintiff to state the date of his birth, and the precise month when he came of age, and to furnish evidence on this point as he ought to have done from the first; and we should be compelled to put off our final decision for a time. But this is unnecessary; and we have only to record opinion that the judgment relied on by the Lower Court is not binding, and ought not to have been used as it has been by the Judge.

On the *second* point, as to whether the adopted son is barred by the laches of the adopting mother, much stress has been laid by Mr. Doyne in the case of Shib Chunder Doss *versus* Shib Kishen Banerjee, and on the learned and elaborate judgments recorded by the Chief Justice Peel and Sir James Colvile. But the real point at issue in that case was whether the English Law of Limitation governed a dispute between Hindoos for lands situated in the Mofussil—whether, in short, the limitation was to be 12 years or 20 years; and we cannot find anything in that decision, or in any other of those laid before us, to warrant us in holding that an adopted son is precluded from ever questioning acts done by his mother during his minority or before his adoption, just as any other reversioner might question such acts. On this point, therefore, there is no ground for saying that the plaintiff is out of Court, although the effect of previous litigation on the subject of the mortgage and sale remains to be considered, and may have an important bearing on our decision.

Boulnois, page 70.

On the *third* point, we agree so far with the learned Counsel as to think that the judgments of the Dinagepore Courts of July 1858 and June 1859 are, as judgments, eminently unsatisfactory. The decision of the Judge is tantamount to no decision, for he gives no reasons, but simply concurs with the Principal Sudder Ameen. The case, however, ran regularly through three Courts, the appeal of the defendant against the adopted son being finally dismissed on a mere point of law by the Sudder Court on the 26th November 1860. Still, we are clear that a judgment on a permission to adopt, and on the consequent legality of the plaintiff's *status*, adoption, and right to sue or claim, is a judgment *in rem* binding against all the world, and not liable to be questioned by third parties. In the case in question, the validity of the *onoomottee puttro*, put forward by the plaintiff, was the main point in issue. Some evidence was tendered in support of the fact; the arguments for and against the genuineness of the deed were fully considered: and the Principal Sudder Ameen, according to his lights, gave a judgment on the point. In Goodeve on Evidence, adoption, like marriage and bastardy, is expressly mentioned as one of the cases in which a judgment would be final and conclusive. The reasoning of their Lordships of the Privy Council in the case reported at pages 36 and 37 of the Weekly Reporter for April 1865, No. 12, seems to point to the same conclusion. The very nature of such a case supports the contention of the plaintiff. A man cannot be repeatedly put to the proof of his legitimacy, nor could it be consonant to public morality, and to the first principles of justice, that a question of bastardy, legitimacy, or the like, which had been decided in the negative by one Court, should again be deemed unsettled and open to question in another Court, unless the opposing party, on whom would lie the burden of setting aside the adoption, were prepared to show, by clear and conclusive evidence, that there had been fraud or collusion. In this view, it is quite unnecessary for us to enter into the various questions that have been argued as to the date of the first appearance of the *onoomottee puttro*—the discrepancy in the signatures of the witnesses to that deed, the hand-writing of Pearee Mohun, or any other similar matter of evidence and inference.

Page 288-9-90.

It is sufficient for us that the plaintiff asserted his adoption in a case which ran duly through three Courts, and in which the opponent had an ample opportunity of procuring redress, if the judgment in favor of adoption were thought defective in law or evidence. We think that less hardship is done by our accepting, as final, a judgment, the reasoning of which may seem open to criticism on such a point, than in laying down that questions of vital importance to public morality, to private *status*, and to social existence, should, after a lapse of years, be treated as mere waste paper, as settling nothing, or as applicable only to the parties between whom they were delivered.

If, then, the case rested on this point only, we should have no hesitation in affirming the judgment of the Lower Court. But, as we have seen, the case has been fully argued on wholly distinct considerations.

We come now to the *fourth* point—the decisions on the mortgage of 1829 and of

1833. The decision, it is admitted by Mr. Doyne, is not a judgment *in rem;* but it is contended that it is a judgment *inter partes* to which the plaintiff was privy through his representative, and by which he is bound. This point does not appear to have been presented to our colleagues when they remanded the case, at least not in this shape. On looking at those judgments, we find that the father of the appellant before us sued to obtain possession of the property mortgaged to him, made all the existing members of the family parties to his claim, and expressly raised the point that mortgages were contracted, and that sales eventually took place on account of the debts of Sooruj Narain, his funeral obsequies, and other ceremonies. The defendants denied the deed of sale, and urged as a reason for their denial *that no debts were incurred by Sooruj Narain.*

These pleas were regularly gone into both by the Provincial and the Sudder Courts, and both Courts agreed in holding, as proved, the existence of the debts and the execution of the sale. A very strong piece of evidence, on which the Court relied, was a report from the Collector of Rungpore, whose business it had been specially to enquire into the condition of Sooruj Narain's affairs with a view to his taking the estate under the Court of Wards, which report stated the existence of heavy charges and liabilities on the estate, including the liabilities to the father of the appellant before us. We cannot, as argued for the respondent, lay any stress on the expression used in the deed of mortgage by the defendants to the effect that the debts were "their debts;" nor can we, at this distance of time, take upon us to say that the evidence on which both the Courts relied at that time was either suspicious in character, inadequate in quantity, or deficient in judicial weight.

The case was very fully tried, and a judgment given on all the points, including that of the indebtedness of the father, which was a condition precedent to the validity of the sale. On this head, therefore, we hold the contention of the respondent to fail.

Our opinion seems fortified by that of the Privy Council in the Madras case already adverted to, in which it was held that the succeeding heirs were bound by a decree obtained against a widow.

Weekly Reporter, April 1865.
Decided 30th November 1863.

Their Lordships said that, "unless it could "be shewn that there had not been a fair "trial of the right in that (a former) suit, "or, in other words, unless that decree could "have been successfully impeached on some "special grounds, it would have been an "effectual bar to any new suit in the Zillah "Court by any person claiming in succession "to Unga Mootoo." "For, assuming her "to be entitled to the zemindaree at all, the "whole estate would for the time be vested "in her absolutely for some purposes, "though in some respects for a qualified in-"terest; and, until her death, it could not be "ascertained who would be entitled to suc-"ceed. The same principle, which has pre-"vailed in the Courts of this country as to "tenants in tail representing the inheritance, "would seem to apply to the case of a "Hindoo widow; and it is obvious that there "would *be the greatest possible inconveni-"ence in holding that the succeeding heirs "were not bound by a decree fairly and "properly obtained against the widow.*"

Now, to apply this principle to the case before us, it is clear that the judgment of the Provincial and Sudder Courts cannot be impeached on any special grounds of fraud or collusion. All that is argued is that the judgment can be gone into, dissected, criticised, and laid bare, as if it were any judgment open to appeal or revision by a higher Court. But this is a doctrine to which we are not prepared to assent. The decision is one which it is beyond our power to revise and interfere with; and all we have to consider is, whether, it being final and conclusive between the parties to the same, it can be held binding on reversioners or next heirs, as raised in the fourth and fifth issues.

Now, the doctrine laid down in the passage just quoted at length would seem fully to authorize us in holding that it can and ought to bind such persons; and this view is further strengthened by the position taken up in the case of Jadoomonee Debia *versus* Saroda Prosunno Mookerjee, reported at page 120 of No. 9, Volume I. of Boulnois.

In that case the authorities and precedents on an intricate point of Hindoo Law were carefully reviewed by Sir C. Jackson and Sir J. Colvile, and the rule laid down was that a conveyance by a widow, with the consent and favor of the next heir living, was a disposition permitted by Hindoo Law, which vested the absolute estate in the donee. Sir C. Jackson, page 125, says: "It is not always easy to discover, on "what principles, doctrines of Hindoo Law

"are founded; but it seems that, where the "widow's conveyance is executed with the "consent of all the nearest heirs living at "the time of conveyance, and there are no "other heirs of preferable or equal degree "living at the decease of the widow, there "the Hindoo Law considers the whole estate "in possession, and the reversion has been "sufficiently represented for the purposes of "such conveyance, and the conveyance "itself is valid. Such a doctrine seems "not only convenient, but unobjectionable "in principle."

Sir J. Colvile, in the same case, page 120, says: "The case of Kasheenath Byrakh "*versus* Huro Soonduree Debia, which has "long given the law to this Court, and, since "it is a decision of the Privy Council, "ought to have given, if it has not given, "the law to the Courts of the East India "Company, establishes that the estate of the "widow is *something higher than a life-*"*estate;* that it entitles her to the posses-"sion of the property without restriction; "and that she has a qualified power of dis-"position in it, the limits of which it is "difficult, if not impossible, to define farther "than by saying that the property of any "particular exercise of that power must "depend on the circumstances on which it "is made, and must be consistent with the "general principles of Hindoo Law regard-"ing such disposition."

The above ruling is further confirmed by the decision of the Privy Council in the well-known and oft-cited case of Hanooman Pandy, and in that of Bamun Doss Mookerjee, page 169 of Volume VII. of Moore, which may be quoted for the present case in so far as it establishes the principle that an authority, given by a husband to a widow to adopt a son, does not, before an adoption has actually taken place, supersede and destroy the personal right of a widow to sue. And the case quoted at page 596 of the S. D. A. Reports for 1856, to our thinking, goes much further than the law, as at present understood, would warrant.

To apply the principle laid down above by the learned Sir J. Colvile, it would perhaps be difficult to find a case where a sale by a widow had been more fairly tried, or where a fuller decision had been given in a suit to which all the necessary persons were made parties, years before the plaintiff was even called into existence.

We have thus sufficiently reviewed the leading authorities on the principles of Hindoo Law involved in a consideration of the fourth and fifth issues laid before us. And from those authorities we can review the salient points, and draw the following conclusions on the facts, as admitted by both parties. The mortgage and sale and the indebtedness of the father Sooruj Narain were all facts which we must consider to have been raised, heard, and finally set at rest as simple questions of fact by the decisions of 1829 and 1833. The whole of the existing partners in, and heirs to, the estate were, moreover, at that time brought before the Courts. The present plaintiff was not even adopted until ten years after the last decision on the disputed conveyance had been delivered. And the permission to adopt, on the plaintiff's own showing, had remained with the widow, unregistered, and not formally brought to the notice of any authority, great or small, for just 30 years after it had been given to the widow. The Courts of 1829 and 1833 had evidently no inkling of any such possible adopted heir *in futuro*, although those were occasions on which Gocool Monee might well have been expected to announce the existence of her deed of permission. Supposing the widow had lived on, as other widows in Bengal have been known to do, for more than 50 years after the decease of their husbands, and had, then in old age, adopted a son, are Courts to countenance the proposition that such a son, when adopted, is not to be bound by the acts of his adopting mother, done and concluded with all formalities, or actually ratified by solemn decrees, of legal tribunals delivered in cases hotly contested up to the highest Court of appeal? We think not. We must remember that the obligation to adopt has been deemed a mere moral obligation, and not one which can be enforced by legal process; and we must also look at the extreme hardship which would result to *bonâ fide* purchasers, who, under deeds or decrees, had remained 30 years in possession like the present appellant, were a contrary doctrine to be suffered to prevail. Our conclusion, then, is that the position of the appellant, whatever it may be on the first three issues, is impugnable on the fourth and fifth issues. It is supported by legal principles enunciated by the highest authorities in this country and in England. It is consonant to public policy, and to the dictates of reason, justice, and common sense. It inflicts no hardship on the plaintiff, while a contrary doctrine would entail grievous consequences on *bonâ fide* purchasers, who, at the time of

their purchase, or at the legal disputes which ensued on such purchases, had complied with all that the law, as known to them, could demand; it is, therefore, a doctrine which we think ourselves bound to support and enforce. We hold, therefore, that the judgments of 1829 and 1833 are binding on the reversioners; and that, even if they could be held as not so binding, they are very strong pieces of evidence in the case to which the plaintiff has not one tittle of evidence to oppose, and which he has only sought to invalidate by surmises, conjectures, and probabilities, to which we could attach no weight. In the lowest point of view, then, we should say that the defendant, when challenged, had proved his purchase, as well as the special circumstances necessary to give the same validity, by evidence which was not only unrebutted, but which in itself was of the most convincing kind.

In this view, therefore, we record our opinions on the fourth and fifth points raised in favor of the appellant, and, reversing the judgment of the Lower Court, decree the appeal with all costs.

The 15th May 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Limitation—Transfer of suit from one jurisdiction to another—Suit by decree-holder to remove obstruction to the execution of his decree.

Case No. 49 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Furreedpore, dated the 30th December 1864.

Takhuroodeen Mahomed Eshan Chowdry (Plaintiff), *Appellant,*

versus

Kurimbux Chowdry and others (Defendants), *Respondents.*

Baboos Unnodapershad Banerjee and *Unoocool Chunder Mookerjee* for Appellant.

Baboo Greeja Sunker Mookerjee for Respondents.

A suit was instituted in Pubna, and, on application to the High Court for authority to proceed with it in Pubna, the High Court ordered its transfer to Dacca. Instead of merely transferring the suit to Dacca, the Pubna Court returned the plaint in order to its being presented anew in the Dacca Court. For the purpose of computing limitation, the suit was held to have been instituted on the day when it was admitted by the Pubna Court.

A suit may be brought by a decree-holder to obtain the assistance of the Court in the removal of an obstruction (*e.g.*, setting aside fraudulent conveyances by the debtor) to the execution of his decree against his debtor's property.

THE plaintiff, having obtained a decree in the Rajshahye Court, sought to execute it in Jessore against the defendant by attaching pergunnah Belgachee, his property there. Fyzbun Chowdry, the son of the defendant Kurreembux Chowdry, claimed the attached property as belonging to him by purchase from his father, and, his claim having been investigated, the property was released from attachment.

The present suit was brought against the father and son in the Pubna Court. It was instituted on the 16th December 1862, a few days before the expiration of a year from the date of the order of release made by the Court of Jessore. The Pubna Court, pursuant to what it supposed to be a direction from the High Court, returned the plaint on the 13th March 1863, in order that it might be presented and filed in the Court of the Principal Sudder Ameen of Dacca. It was not filed in the last mentioned Court until the 23rd April 1863; and it was afterwards again returned, and was lastly filed on the 14th May 1863 in the Court of the Principal Sudder Ameen of Furreedpore, within whose jurisdiction the land mentioned in the plaint, or the chief part of it, is situated.

The plaint states the proceedings taken in execution of the decree in the Jessore Court, the intention therein of the defendant Fyzbun Chowdry claiming as purchaser, and the release of the property from attachment. It is then alleged that this defendant's claim by right of purchase (which apparently extended to all his father's property in the several districts named) has been notified to the Collector and in all the Courts of the district, and that it is an obstacle to the plaintiff's proceeding to obtain execution by attachment and sale of pergunnah Bajooras Mohabutpore, a property belonging to the judgment-debtor, the defendant Kurreembux Chowdry, situated within the Pubna jurisdiction. The relief prayed is that the title of the judgment-debtor to the last named property and to Belgachee (which is here stated to be within the Furreedpore jurisdiction) may be declared, and that the lands be made liable to satisfy the plaintiff's decree.

The suit was dismissed by the Principal Sudder Ameen of Furreedpore, on the ground that it was barred by limitation. This is an appeal from his decision; and if we con-

strued the plaint in the sense in which it has been understood by the Principal Sudder Ameen, that is, as seeking to set aside the order of release made by the Jessore Court, we should concur in the judgment, although not concurring in the reasons assigned in support of it. When the plaint was filed, the property therein mentioned being situated in different districts, the requisite application was made to the High Court, under Section 12 of the Code of Civil Procedure, for authority to proceed with the suit in the Pubna Court. The High Court directed the suit to be transferred to the Dacca district, the chief part of the property being within that district. The effect of the order was merely to transfer the suit already instituted in the Pubna Court to the Dacca Court; and thus its legal effect cannot be changed by the improper and erroneous procedure, which was apparently adopted, of returning the plaint in order to its being presented anew in the Dacca Court. For the purpose of computing the period of limitation, this suit was, we think, instituted on the day when the plaint was received and admitted by the Pubna Court, notwithstanding that the requisite authority from the High Court to enable the Pubna Court to proceed with the hearing of the suit was not eventually obtained, and notwithstanding the mode in which its transfer to the Dacca Court was effected. We cannot, therefore, assent to the Principal Sudder Ameen's reason for the dismissal, which seems to be that the plaint, having been returned by the Pubna Court, was not presented to the Dacca Court before the expiration of the year. Had it been presented in the latter Court within that period, it would not, we think, have availed the plaintiff. The true reason, in our judgment, is that the plaintiff was bound to institute a suit for this purpose in the Jessore jurisdiction, within one year from the date of the order; and not having done so, his right of suit is barred. It is argued, however, for the appellant, that the plaint may fairly be read, not as a plaint by a judgment-creditor, who (having proceeded to execute his decree, and having been successfully opposed by a claimant) seeks to set aside the adverse summary order, and establish his right, but as a plaint by a judgment-creditor, who has hitherto taken no proceedings whatsoever in execution against his debtor's property within the jurisdiction of the Court in which he sues by reason of some apprehended obstacle to his so doing; and who now asks the aid of the Court to remove the obstacle in order that he may have the full benefit of his judgment. A person who has obtained a decree, before he proceeds to execute it against his debtor's property, the title to which has perhaps been made doubtful or obstructed by the fraudulent conveyances of the latter, may, in many cases, find it to his advantage to institute in the first instance a regular suit to set aside those conveyances, and the law permits him to bring such a suit. If the suit now before us may fairly be regarded as a suit of this description, it is maintainable. On the other hand, if the plaintiff sues, however indirectly, to obtain the reversal of the summary order, his suit is barred. It has appeared during the hearing of the appeal, and is not, we believe, now denied, that pergunnah Belgachee, though within the Jessore Collectorate, is subject to the jurisdiction of the Furreedpore Civil Court. The proceedings in execution against Belgachee, in the former Court, were, therefore, wholly without jurisdiction and void. They may, with the summary order therein passed, be disregarded, and this suit, although the plaint refers to the proceedings in Jessore, may be considered as a suit by a decree-holder to obtain the assistance of the Court in the removal of an obstruction to the execution of his decree against his debtor's property. Such a suit is, we think, maintainable; and as the present suit has been brought within due time, it should be heard and determined.

We must remand the case to the Lower Court for trial.

The 15th May 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Limitation—Joint Hindoo Family—Allegation of separation—Onus probandi—Witnesses (Enforcing attendance of).

Case No. 411 of 1864.

Regular Appeal from a decision passed by the Second Principal Sudder Ameen of Hooghly, dated the 15th July 1864.

Bissumbhur Sircar and others (Defendants), *Appellants,*

versus

Soorodhuny Dossee (Plaintiff), *Respondent.*

Baboo Kishen Succa Mookerjee for Appellants.

Baboos Hem Chunder Bannerjee and *Ashootosh Dhur* for Respondent.

Suit laid at rupees 5,176 3 annas 18 gds.

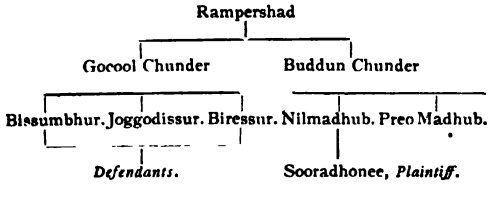
Object of Section 11, Act XIV. of 1859 (computation of period of limitation in cases of disability.)

In a suit for a share of ancestral property, the *onus* is on the defendants to prove their allegation of separation at a certain time, they having admitted that the family was joint up to that time, and claiming the property as separately acquired subsequent to that date.

A Court acts illegally in directing a party without cause to re-issue summons for the attendance of his witnesses, instead of enforcing their attendance by attachment and fine when the party requiring their evidence has done everything in his power by issue of summons, and then by depositing *tulubanah*, &c., as required by law, for issue of process of attachment.

THIS suit was to recover a 4-annas share of certain ancestral and family property to which plaintiff alleged that she was entitled on the part of her deceased husband, Nilmadhub Sircar.

The family tree is as follows:—The common ancestor was



Plaintiff alleges that the brothers, Gocool and Buddun Chunder, were joint in estate; and that, after the death of Buddun, the family continued to be joint till 1262, when a separation and division of the property took place; that her husband, Nilmadhub, having died in 1259, she, being a minor at the time of the partition of the property, was deprived by the defendants of her husband's share; that, having attained majority in 1268, she brings the present action to recover her husband's 4-annas share from the defendants, making her brother-in-law, Preo Madhub, a formal defendant.

The defendants allege that Gocool and Buddun separated in 1232 B. S.; that after this separation, Gocool, who was a mooktear in Hooghly, made money and purchased property, of which he was in the sole possession and enjoyment, and which descended to the defendants, his sons; and to this property, neither Buddun nor his descendants have any right. The defendants pleaded limitation against the plaintiff's allegation that she came of age in 1266; and that, under the provisions of Section 11, Act XIV. of 1859, her suit should have been brought within three years from that time; and in support of their allegation as to her age, they filed a decision of the Pincipal Sudder Ameen, bearing date the 18th November 1858, in which she was sued for the amount of a debt, and answered to the claim by a vakeel, and was not in those proceedings styled a minor.

Even admitting that the plaintiff attained majority in 1266, we think that she is not out of Court by limitation. Her cause of action arose on her husband's death in 1259, and she brought the present suit in 1269; so that, under the provisions of Clause 13, Section 1 of Act XIV. of 1859, she is within time, and her allegation of minority need not be taken into consideration. The same question was heard and determined by Mr. Justice Trevor and Mr. Justice Campbell on the 4th May last in the special appeal of Kalidas Chatterjea and others, No. 3165 of 1864, and we quote that part of their judgment which disposes of this objection: "We "think that the Judge has wrongly construed the Law of Limitation. Act XIV. "of 1859, Section 11, was never intended to "place minors under a special disability as "compared to majors; but to make a special "concession in their favor. A man who "comes into Court after attaining his majority, if he is within the ordinary time of limitation provided by Section 1, is not "bound to invoke Section 11. Section 1 "is complete in itself, and applies to "all suits. Section 11 is an additional "or supplementary provision, giving minors "liberty to take a fresh start for computation from the time of attaining majority, provided that the privilege so accorded is limited to three years. If the "plaintiff's time, computing from the original cause of action (accruing in his majority), had expired during his minority, or "had less than three years to run, he would "have had full three years; but that not "being so, he has the ordinary twelve years "from the original cause of action." Concurring entirely in this view of the law taken by our colleagues, we reject the plea of limitation.

On the merits, we find that the Lower Court has given a decree for the plaintiff, holding that the defendants, upon whom was the *onus* of proving that the property was self-acquired by Gocool after separation, had failed to substantiate this allegation. It is urged before us that it was for plaintiff, who admitted that a separation took place in 1262, to prove the continuance of the joint estate up to that period; but we hold with the Lower Court that defendants were

bound to prove their allegation of separation in 1232, having admitted that the family was joint to that time, and claiming the property as separately acquired subsequent to that date. The defendants have brought forward several members of their family, neighbours, and others, who prove that the families separated many years ago, and that the property in dispute had always been in the sole possession of Gocool and his descendants. We find also all the documents, such as conveyances and receipts connected with these properties, drawn up in the name of Gocool, and in the custody of Gocool's representatives; and though such facts are not conclusive as to the sole possession of the defendants, they make out a sufficiently strong case to require the Court to call upon the plaintiff to prove that this family continued joint after the period asserted by the defendants. She has filed a quantity of correspondence between Buddun and Gocool, and also letters from the zemindar, which, it is alleged, clearly shew the *status* of the family to a very recent period; and she has examined one or two witnesses to prove that the family continued undivided till 1262. Unfortunately this correspondence has not been attested, and in its present state cannot be admitted as evidence; but, on reference to the record, the pleader for the plaintiff (respondent) points out how hardly his client has been dealt with by the Lower Court, which virtually refused to enforce the attendance of her witnesses, who could have proved the genuineness of this correspondence, and otherwise substantiated her case. We find that plaintiff did everything that she was required to do by law to procure the attendance of her witnesses, and put in the *tulubanah* to take out process of attachment of their property; but, instead of this, her reasonable request being complied with, she was directed by the former Principal Sudder Ameen again to issue summons for their attendance, so commencing the whole business *de novo*. We think this order quite illegal, and that it cast additional and most unnecessary expense and trouble on the plaintiff—an order with which, from her circumstances, she was unable to comply. She stated the whole circumstances of the case in a petition to the present Principal Sudder Ameen on 4th July last; but that officer considered himself bound by the acts of his predecessor. We think that justice cannot be done in this case unless that evidence be taken, and we, therefore, remand the case under the provisions of Sections 355 and 356 of Act VIII. of 1859, in order that the Principal Sudder Ameen, after enforcing the attendance of the witnesses, as provided by law, may record their evidence, and re-submit it to this Court. The defendants will also be allowed to adduce any further evidence already offered by him should he wish to do so.

The 15th May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear,

Judges.

Costs—Government made a defendant.

Case No. 22 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 29th September 1864.

The Government (Defendant), *Appellant,*

versus

Musst. Sanoola, Pauper (Plaintiff),

Respondent.

Baboo Kishen Kishore Ghose for Appellant.

Mr. C. Gregory for Respondent.

Suit laid at rupees 252-13-6.

Suit for a certificate of administration under Act XXVII. of 1860. Government did not apply for any such certificate, or oppose the plaintiff's suit. But having been made a defendant by the plaintiff, and obliged to make an answer—HELD that it was not liable to be cast in costs.

IN this case Government has been cast in costs, and appeals on the ground that it did not oppose plaintiff's suit; but, having been made a defendant by plaintiff, merely truly stated such facts as were within its knowledge, and then asked for the Court's adjudication of the case. We think that this appeal must be decreed. The Judge, acting under Section 7, Regulation V. of 1799, directed that the Collector should take charge of the real property, and took charge himself of the moveable property, because the plaintiff, and second and third defendants, who were parties to the proceeding under Act XXVII. of 1860, *i. e.*, seeking to obtain a certificate of administration, could not prove their right to it. Government did not apply for any such certificate. The answer of Government was necessary, as plaintiff had made Government a defendant. We do not think plaintiff had, under the above facts, a right to do this, and we think plaintiff should accordingly pay all the costs of Government.

This appeal is decreed with costs accordingly.

The 15th May 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Hindoo Law—Adopted son (Rights of).

Case No. 386 of 1864.

Regular Appeal from a decision passed by the Deputy Commissioner of Lohardugga, dated the 9th May 1864.

Maharajah Juggurnath Sahaie and others (Plaintiffs), *Appellants,*

versus

Musst. Mukhun Koonwur and others (Defendants), *Respondents.*

Baboo Mohesh Chunder Chowdhry for Appellants.

Mr. J. Baptist and *Moonshee Ameer Ali* for Respondents.

Suit laid at rupees 10,000.

Under the Hindoo Law an adopted son has all the rights of a son born. When, however, an adopted son rests his title to succeed to a property on a confirmatory sunnud, he is bound to prove the sunnud.

THIS was a suit on the part of Rajah Juggurnath Sahaie to resume a jagheer held by Agnee Deb Narain, the adopted son of Beharee Lal, the former jagheerdar. The suit was before this Court in 1863; and, on the 10th July of that year, it was remanded to enable the Lower Court to come to a distinct finding on the following points: *1st.* Whether the plaintiff can resume a jagheer on the death of the jagheerdar without direct heirs, and bar the right of an adopted son to succeed? *2nd.* Was the defendant adopted by Beharee Lal, and then duly recognized as grantee by the Maharajah; and was a confirmatory sunnud granted to him? The Lower Court found that, from a decision of the Agent to the Governor-General, dated 12th Poos 1234 (and which, in the absence of any decision or evidence to the contrary, we must accept as laying down correctly what is the local custom of the province under his authority in these matters), that the plaintiff was at liberty to resume grants made by himself or his ancestors upon the failure of heirs direct of the original jagheerdar. The Judge found, therefore, that adoption was no bar to resumption; but he held that resumption was barred in this case by a confirmatory sunnud granted by the Rajah in favor of the defendant on 16th Assin 1263 Sumbut, and he dismissed the suit.

The plaintiff has appealed, repudiating the sunnud as a forgery. On the other hand, we are asked to express an opinion whether an adopted son has not all the rights of a son born. We think that, under the Hindoo Law, the adopted son has the same right as the son born; and, if this jagheer were, strictly speaking, hereditary, the adopted son, unless prevented by local or other custom, might succeed without any confirmation from the Rajah. But, in the present case, the defendant has rested his right upon a confirmatory sunnud from the Rajah. The sunnud has not been proved. No witnesses have attested it, and it is evidently not executed in the usual formal and official manner that other deeds of similar character are. We therefore reject the sunnud.

It is then urged that an adopted son is entitled to succeed, sunnud or no sunnud, and that the plaintiff has given no proof that he had authority to resume. The defendant, however, in this case rested his claim on the confirmatory sunnud, which he has failed to establish. And the fact, even if true, that the Rajah has received rent from defendant will not deprive the Rajah of the right to resume a right declared by the Governor-General's Agent to exist in him. Under this view of the case, we reverse the order of the Lower Court, and decree the appeal with costs.

The 16th May 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Suit by Executor of alleged adopted son (whose title is questioned by defendant)—De facto possession—De jure title—Jurisdiction.

Case No. 211 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Mymensing, dated the 18th September 1864, reversing a decision passed by the Moonsiff of this District, dated the 4th July 1864.

Bhowanee Pershad Surmah Khan (Plaintiff), *Appellant,*

versus

Dhurm Narain Neogy and others (Defendants), *Respondents.*

Baboo Kishen Doyal Roy for Appellant.

None for Respondents.

Suit by an executor of an alleged adopted son of a party, upon a bond executed in favor of that party, for an account

cluding interest) below 500 rupees. The defendant ving questioned the plaintiff's title—HELD that it s sufficient for the plaintiff either to show that he had tained a certificate under Section 2, Act XXVII. of 6, or to prove that he was in *de facto* possession of deed, and that the Lower Appellate Court acted ond jurisdiction in directing an enquiry into the ntiff's *de jure* title.

Although the case was one cognizable by a Small se Court, and no special appeal therefore lay to this rt under Section 27, Act XXIII. of 1861, yet, under ion 35 of that Act, the Court set aside so much of Lower Appellate Court's order as was beyond juris-tion.

PLAINTIFF in this case sued as the execu- of an alleged adopted son of the party in se favor the bond was executed for the due under the same, which with interest unts to less than 500 rupees.

he defendant pleaded: *1st.* That plaint- as not the adopted son; and *2nd.* That, gh he had executed the instrument, he received no consideration for the same.

he first Court gave plaintiff a decree, g of opinion that the fact of plaintiff g in possession of the deed as executor e heir of the party in whose favor the d admitted by defendant to be genuine executed was sufficient to entitle him to ntain the present action, and also that the endant had failed to prove the absence of able consideration.

n appeal, the Principal Sudder Ameen nded the case for enquiry into the ity of the adoption of the party whose utor plaintiff is, inasmuch as his title has questioned by defendant.

e plaintiff then appealed specially nst this order; and the first point we to determine is, whether such an ap- s maintainable or not? We are clearly inion that it is not. The case is one nature cognizable by a Court of Small es, and is for a sum less in amount than upees. Under Section 27 of Act XXIII. 61, therefore, there is no appeal to this . But, in hearing the appeal, the ipal Sudder Ameen has exercised a diction not vested in him by law, and fore we are entitled, under Section 35 e law above cited, to set aside so much at order as is done beyond his jurisdic-

In a case like the present, when the ndant questions the title of the plaintiff, enough for that party either to show he has obtained a certificate under Sec- 2, Act XXVII. of 1860, or to prove that in *de facto* possession of the deed upon n the suit is instituted as the heir of the in whose favor the instrument was ted. When he has proved one or the other of those states of circumstances, he has done sufficient for the purposes of the suit; and any enquiry into his *de jure* title is beyond the scope of the case. Under this view we think that the order passed by the Principal Sudder Ameen in appeal was beyond his jurisdiction in the case. We, therefore, as we are empowered by the law above cited to do, set it aside, direct him to re-call the case to his own file, and decide it in the mode suggested in the above remarks.

The 16th May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Suit by Heir—Same cause of action—Different property.

Case No. 21 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Tipperah, dated the 10th August 1864.

Sooruj Pershad Tewary and others, Paupers (Plaintiffs), *Appellants,*

versus

Saheb Lal Tewary and others (Defendants), *Respondents.*

Baboo Woomesh Chunder Mookerjee for Appellants.

Baboos Chunder Madhub Ghose and *Sreenath Banerjee* for Respondents.

Suit laid at rupees 23,958-5 annas 4 gundahs.

A suit by an heir on the same cause of action on which a suit was previously brought by his father, though, for property different from that which was the subject of that suit, is barred by Section 7, Act VIII. of 1859.

IN this case plaintiff sued to recover possession of one-third of certain landed property held in co-parceny, also of a one-third share of the money value of certain other landed joint property, and one-third of certain cash, also joint property.

In his examination, plaintiff also states he "is entitled to obtain one-third share of the afore-mentioned (joint ancestral) talooks and cash."

Defendant pleaded that Section 2, Act VIII. of 1859, barred the suit as a *res adjudicata.*

The Lower Court has decided that this suit was barred by Section 7, Act VIII. of 1859, inasmuch as, although this suit was not for the *identical* property for which a

previous suit had been brought by plaintiff's father, still it was for property from which plaintiff's father had been ousted by the same defendants (as alleged by plaintiff in 1258); while plaintiff's father had sued the same defendants for this one-third share of ancestral property as held jointly up to 1259, and then taken from plaintiff by defendants. Further, because in that suit plaintiff's father had omitted to sue for the particular items *now* sued for by plaintiff. The Lower Court states its opinion more fully thus: "The Court finds that "plaintiff, as heir to his father, has brought "the present suit on the same cause of action "(on which the suit was previously brought "by his father, which suit was dismissed), "though the property, the subject of this "suit, is different from the property which "was the subject of that suit. Hence it "is perfectly clear that this claim is for a "portion, relinquished by plaintiff's father, of "the claim instituted by him, and plaintiff "has now preferred it on the same ground."

The Court then referred to the fact that plaintiff states that his father was dispossessed from the property now in suit in 1258, while plaintiff in that suit claimed as for ancestral property of which he had been dispossessed up to 1259, and held that it was incumbent on plaintiff's father to have included this claim in *that* suit; but that, as plaintiff's father knowingly relinquished it, plaintiff cannot, under Section 7, Act VIII. of 1859, now sue. The plaintiff's suit was accordingly dismissed, and plaintiff now appeals:—

1st. That his present suit was for *partition*, while his father's was for *possession*.

2ndly. That the property now sued for is not the same as that for which his father sued; and that the cause of action is the claim to obtain possession wrongfully withheld, while that of his father's was dispossession.

3rdly. That, even if his father had omitted in his suit property of which he had not possession up to 1259, still it was competent for plaintiff to sue for what was omitted to be sued for and relinquished by his father.

On the *first* plea, we shall merely remark that it is a vague and groundless assertion, unsupported, as before shown, by anything in the plaint, or in the plaintiff's examination and statement of his own claim.

On the *second* and *third* points, we observe that this suit has been dismissed under the provisions of Section 7 of Act VIII. of 1859, which enacts: "Every suit shall "include the *whole* of the claim arising "out of the *cause of action;* but a plaint-"iff may relinquish any portion of his "claim in order to bring his suit within the "jurisdiction. *If the plaintiff relinquish* "*or omit to sue for any portion of his claim,* "*a suit for the portion so relinquished or* "*omitted shall not afterwards be enter-* "*tained.*"

Now, for the purpose of applying this law, it is almost needless to observe that plaintiff, as heir to his father, can only do what his father could have done. Nor could his father have brought his suit after that which he brought was dismissed. The father's suit was also for one-third share of ancestral joint property. This specific property was not included in terms in that suit. But the plaintiff's father then stated that he sued to obtain possession of the joint ancestral property, which he had lost up to 1259, and by the ousting of these same defendants, his co-sharers. Ought not then plaintiff's father to have included the present specific items in that claim? The cause of action was to obtain possession of the joint ancestral property from the same dispossessing defendants as here, or the co-parceners; and, plaintiff's father having relinquished this present claim on that cause of action in that suit, can the present suit be entertained? We think the Section (7) cited prohibits this suit being entertained. A case in Marshall's Reports, 19th February 1863, page 286, Shumsuhnissa and Buzl-ul-Ruheem, has been cited to us by the appellant to support his view. But in that case the wife, who sued, had come subsequently to the knowledge that a certain item had, amongst other items, been misappropriated by her husband, and she had no means of knowing the fact before, the husband alone having full and entire control over each and every portion of his wife's property. But here such is not the case, and the plaintiff's father had the same means of knowledge, as the plaintiff, of the property which form the subject of this suit.

On the other hand, in a case, 2nd February 1865, page 149, No. 12, Sutherland's Weekly Reporter, it was clearly held that, where the subject of both suits in that case was to establish the plaintiff's husband's title, and obtain possession of the land as the husband's widow and representative, there was but one cause of action, and the plaintiff ought, under Section 7 of Act VIII. of 1859, to have included her whole claim in one suit.

We think the principle of this ruling is applicable to the facts of this case, and that plaintiff is on that principle precluded by Section 7 of Act VIII. of 1859 from suing; and we, therefore, affirm the decision of the Court below, and dismiss this appeal with costs.

The 16th May 1865.

Present:

The Honble W. Morgan and Sumbhoonath Pundit, *Judges.*

Land taken for Railway—Right of way.

Case No. 418 of 1865.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 2nd December 1864, affirming a decision passed by the Moonsiff of that District, dated the 26th July 1864.

Collector of the 24-Pergunnahs and another (Defendants), *Appellants,*

versus

Nobin Chunder Ghose (Plaintiff), *Respondent.*

Baboo Kishen Kishore Ghose for Appellants.

Baboos Kali Prosonno Dutt and *Romesh Chunder Mitter* for Respondent.

A right of way cannot, by the provisions of Act VI. of 1857, continue to exist over land acquired by a Railway Company under that Act with the aid of Government. If, however, the Railway Company, by their representations and conduct, lay themselves under legal obligation to provide a way, such obligation may be enforced.

The line of the South-Eastern Railway, passing through the plaintiff's mouza, has severed about 1,200 beegahs of land from the remaining portion of the mouza, which lies on the south side of the line. The ryots of the land so severed live on the southern side of the Railroad, and, before the making of the line, they had access by a road from their dwelling-houses to the land cultivated by them. This suit is brought against the Railway Company (the Government being also made defendant) to procure the removal of obstructions caused by them, and to establish the right of the plaintiff and his ryots to a road across the Railway. Both the Lower Courts have decreed in substance the plaintiff's suit, principally because the Courts find that the plaintiff's ryots have no mode of access to their lands except by crossing the line; and that their right to pass over the land now occupied by the Railway remains as it was before the Railway was made, notwithstanding that the land itself has been acquired by the Railway Company.

We think the decision cannot be supported on these grounds. The Railway Company, with the aid of Government, acquired the land under the provisions of Act VI. of 1857; and by the 8th Section of that Act, the land taken became vested in the Government, and afterwards in the Railway Company, absolutely, and free from every right or interest therein, of whatever description, possessed by the former proprietors, or by other persons. All rights before existing, whether of passage or of any other kind, absolutely ceased upon the acquisition of the land for the Railway; and no right of way afterwards arose, or was continued, merely because there remained no mode of access to the land on the north, otherwise than by crossing the line. The express provisions of the law are not consistent with the existence of such a right.

In the judgment of the Lower Appellate Court there is reference to a promise stated to have been made by the Railway Company to provide a level crossing at the place in question; and the Railway Map, which is in evidence, shows the trace of a road there. If the Railway Company have, by their representations and conduct, laid themselves under legal obligation to provide a road or crossing, the plaintiff is entitled to enforce that obligation; and, although the present suit is based on a misconception of his strict rights (which in our view arise, not as he supposes from the continued existence of the old rights, but from the acts of the Railway Company in conferring a new right of way), we think the suit may nevertheless proceed for the purpose of obtaining the relief to which he is really entitled. We must remand the case in order that it may be ascertained whether the Railway Company have, by their conduct or representations, contracted to provide and maintain any and what description of way for the plaintiff and his ryots over the line. If the Court is satisfied by the evidence that the defendants have so engaged, a decree may be awarded in plaintiff's favor.

The 17th May 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover,

Judges.

Bona fide purchase—Refund of purchase-money —Caveat emptor.

Case No. 3562 of 1864.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 20th September 1864, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 26th February 1864.

Kishen Mohun Shaha (Plaintiff), *Appellant,*

versus

Ram Chunder Dey (Defendant), *Respondent.*

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Appellant.

Baboos Luckhee Churn Bose and *Banee Madhub Banerjee* for Respondent.

A bonâ fide purchaser is entitled to refund of purchase-money in a case where, some dispute having arisen as to the purchase, the matter was referred to arbitration, and it was held that the vendor had no authority to sell. The principle of *caveat emptor* does not apply to such a case.

THE allegation of the plaintiff in this case is that he purchased a certain property from Latuck Chunder through his son Ram Chunder. There was some dispute as to the purchase, and the case was referred to arbitration, when it was held that Ram Chunder had no authority to sell. Plaintiff now sues to recover from Ram Chunder the purchase-money.

The first Court decreed the claim; but the Judge, on appeal, is of opinion that "the principle of *caveat emptor* applies," and has refused the plaintiff any redress.

This is objected to on special appeal, and we think on good ground. If the plaintiff has paid Ram Chunder the consideration-money, he is entitled to refund under the circumstances stated, that is, if there has been no fraud on his part, and we do not see that any fraud is alleged — certainly it is not found by the Judge.

The judgment of the Lower Appellate Court is reversed, and the case remanded for re-decision.

The 17th May 1865.

Present :

The Hon'ble C. B. Trevor and G. Campbell,

Judges.

Pleadings—Raising of legal points by Court —Admissions.

Case No. 3415 of 1864.

Special Appeal from a decision passed by the Judge of Dacca, dated the 29th August 1864, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 23rd February 1863.

Gour Kishore Potedar and others (Plaintiffs), *Appellants,*

versus

Sheik Chitoo Bepary and others (Defendants), *Respondents.*

Baboo Hem Chunder Banerjee for Appellants.

Baboo Kalee Mohun Doss for Respondents.

A Court may raise any legal points which arise on the facts found; but where a fact is impliedly admitted, to lose sight of the admission, and to raise points of law independent of it, is beyond the proper duty of the Court.

When a defendant files an answer impliedly admitting a liability, if a particular office was held by a party, and avoiding that liability simply by pleading that the particular office was not so held, the only issue to be tried is, whether that party held the office at the time; and, on that fact being proved adversely to the defendant, a decree must pass against him.

PLAINTIFF sued the defendant for the sum of 441 rupees with interest. He alleges that in 1268 one Monie, a gomashtah of the defendant, took from him in the course of business 1,441 rupees, granting him a hoondee on a Calcutta firm; that this hoondee on presentation was dishonored; that 1,000 rupees was paid to him on the 31st Srabun 1269 under defendant's order; but, as the remaining sum remains unliquidated, he brings the present action.

The defendant denied liability, inasmuch as the party, who granted the hoondee and took the money, was not in his service in 1268; that that individual had left his service in 1265; and that he was not liable for any act done by him during that year.

The first Court found that the other person Monie was in defendant's service in 1268, and consequently he was liable.

On appeal, the Lower Appellate Court found: *1st.* That Monie was defendant's gomashtah in 1269. *2nd.* That there was no proof showing that that person could bind his principal in acts like the present; and

3rdly. That the payment of 1,000 rupees by defendant's orders, which might act as a ratification of the act done without authority, is not satisfactorily proved. The Judge, therefore, dismissed the plaintiff's suit.

Plaintiff now appeals specially, urging that the Judge has imported into the case matters not arising out of the pleadings; that the authority of Monie was not questioned, had he been the gomashtah; the whole case of the defendant was made to rest on the fact that the gomashtahship of that person ended in 1265; and, as this has been found adversely to the defendant, a decree should have been passed in plaintiff's favor.

We think that the contention of the plaintiff is sound. When a party files an answer like that in the present case, which impliedly admits a liability, if a particular office was held by a party, and avoids that liability simply by pleading that the particular office was not so held, the only issue to be tried is, whether the party held that office at the time; and, on that fact being proved adversely to the defendant, a decree must pass against him. It is, of course, quite right for the Principal Sudder Ameen to raise any legal points, which arise naturally out of the facts found; but, as before remarked, when a fact is impliedly admitted, to lose sight of the admission, and to raise points of law independent of it, is beyond the proper duty of the Court. As the Appellate Court, though it finds the payment of the 1,000 rupees by defendant's order not proved, has found that Monie was defendant's gomashtah when the sum claimed was taken from the plaintiff by him, the order of the first Court, decreeing that amount to plaintiff, must stand good with costs of the Lower Courts and of this Court also.

The 17th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Easement—Right of light and air.

Case No. 3613 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 16th September 1864, affirming a decision passed by the Additional Sudder Moonsiff of that District, dated the 10th October 1863.

Puran Mudduck (Defendant), *Appellant,*

versus

Ooday Chand Mullick and others (Plaintiffs), *Respondents.*

Baboo Kedarnath Mojoomdar for Appellant.

Baboo Luckhee Churn Bose for Respondents.

Ancient lights cannot be obstructed by the owner of the adjacent land building on it, so as to obscure the light and air always enjoyed. Whether the party has or not other windows on another side of his premises is immaterial.

THIS was a suit for possession of a certain strip of land adjacent to the plaintiff's (special respondent's) house, and to restrain the defendant from blocking out light and air from the special respondent's premises by building exactly in front of, and abutting on, them.

Both Lower Courts found that the plaintiff had no title to the land sued for; but they restrained the defendant from raising his wall or building so as to obstruct the light and air which had all along been enjoyed by the plaintiff through two windows against which the new wall was in process of erection.

It is urged in special appeal:—

1st.—That, as the land has been proved to belong to special appellant, he is entitled to do what he likes with it, and build on it at his pleasure; and

2ndly.—That the Lower Courts have restrained the special appellant's building more than is necessary to the special respondent's enjoyment of light and air.

Neither of these objections is tenable. The *first* is diametrically opposed to the law of easements, which provides that ancient lights cannot be obstructed by a party owning the neighbouring land, and building on it, so as to obscure the light and air always enjoyed. It is no answer to this to plead that the party complaining has other windows on another side of his premises. He is entitled to retain the light and air he has always had, and the owner of the adjacent land cannot obstruct it.

For the rest, the Principal Sudder Ameen forbade the special appellant to build a second story to the *dalan.* This was manifestly the only possible way of giving the special respondent the relief he sought. It would have been ridiculous to have ordered, as the special appellant now wishes, apertures to have been left opposite the special respondent's windows through which he might have retained the light sought for; for, if it

had been possible so to arrange matters regarding the light, the special respondent would still have been shut out from his ancient supply of air.

We think that the Principal Sudder Ameen's order was both legal and proper, and we accordingly dismiss the special appeal with costs.

The 17th May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Fraud of father—Son when bound by.

Case No. 311 of 1864.

Regular Appeal from a decision passed by the Judge of Jessore, dated the 27th May 1864.

Bhuggobutty Dossee and others (Defendants), *Appellants,*

versus

Kishen Nath Roy (Plaintiff), *Respondent.*

Baboos Gopal Lal Mitter and *Onoocool Chunder Mookerjee* for Appellants.

Baboo Kishen Kishore Ghose for Respondent.

Suit laid at rupees 2,990-9 as. 16 gds.

A son cannot obtain a decree when suing as heir to regain property, alleging his father's fraud as the cause of the action.

In this case plaintiff, as manager for the minor sons of Soorjnath Doss, deceased, sued for a declaration of title to certain landed property. It is alleged in the plaint that Soorjnath, in his life-time, and in order to avoid the claim of creditors, executed two hibbanamahs, or deeds of gift, on the 12th Bhadro 1255: one in the name of his wife Mohessuree, the mother of the minor, and the other in the name of his *second* wife Bhuggobutty; that Soorjnath remained in possession after that act till he died on the 6th Assin 1256, having appointed his nephew, Kasheenath Ghose, and his old servant, Fukeer Chand Mitter, defendants, as managers of the estate *for the minor.* It is also alleged by plaintiff that Kasheenath fabricated a mourosee pottah, dated 11th Bhadro 1259, purporting to have been given by Bhuggobutty. and in the benamee of one Kala Chand Holdar; also that Kasheenath then caused a case under Act IV. of 1840 to be brought, and, under cover of it, ousted the minor from some lands, and did so also from other property by selling the minor's property in execution of decrees for the debts of the widows.

Defendant Kasheenath pleads that the two deeds of gift are valid and not in fraud of creditors; that the widows held possession under them, and duly granted the mourosee pottah and other leases under that title. The defendants Bhuggobutty and Fukeer Chand support the answer of the defendant Kasheenath.

The Lower Court has held that the hibbanamahs are fictitious and fraudulent documents, and that the leases and sales under them are invalid.

It was pleaded in the Lower Court that, if this were so, the fraud was that of plaintiff's father to defeat creditors; and that plaintiff, though a minor, could not sue to obtain this property on the ground of his father's fraud.

The Lower Court, however, decided that, as the minor did not accept nor join in his father's fraud, and the widows were only unconscious instruments in the hands of the defendant Kasheenath, the minor was not to be bound in such a case.

The case was decreed in plaintiff's favor accordingly, and the costs of Mohes Chunder Chuckerbutty were charged against plaintiff, on the ground that the former had been unnecessarily made a defendant by the latter.

The defendant appeals, urging amongst other grounds that, as the plaintiff comes into Court on his right as heir from his father, whose acts have all been held by the Lower Court to have been fraudulent, he cannot recover on the ground of his father's acts being fraudulent, but must be bound by his father's fraud.

We think that this objection is valid. The case of Obhoy Churn Ghuttuck, December 1859, page 1639, is quite in point, and must be followed. We quite concur in the concluding words of the judgment in it:—

"A deed may be avoided on the ground "of fraud, but then the objection must come "from a person neither party nor privy "to it, for no man can allege his own fraud "in order to invalidate his own deed. "This rule is, we think, a very wholesome "one in this country. It is well that the "natives of this presidency should under-"stand that, when they execute fictitious "deeds for the purpose of defeating their "creditors, avoiding an attachment, or effect-"ing any other fraudulent purpose, they "place themselves completely at the mercy

"of the person in whose name the fictitious conveyance is made out, and that "the plea of the transaction being a benamee one will not be listened to."

The pleader for the opposite party cites the Sooboodra Bebee, pages 543-544 of the Decisions of the Sudder Dewanny Adawlut for 1858. But there was more than one peculiarity distinguishing it from the case of Obhoy Churn Ghuttuck. It was held in Sooboodra's case that a purchase, made in the name of another with a view of preventing the real purchaser's creditors laying hold of the property, is not such a *legal fraud* as will *estop* the original purchaser, or those who represent him, from *bringing an action* for the enforcement of the transaction *against the party* in whose name the property was purchased; and that a plaintiff cannot sue to render void an act done by him in fraud, or to be relieved from the effect of his own fraudulent act, but may, however, sue to have a *legal act*, that is, an act legal in itself, such a benamee purchase, enforced, even though made, as in the present instance, with a motive of keeping the property out of the reach of his creditor.

But that was not a case like this where the plaintiff, as heir, comes in to regain property alleging his own father's fraud as the cause of action. Further, the case of Obhoy Churn is, moreover, the later ruling.

We, therefore, consider the decision of the Court below wrong, and we decree this appeal, and dismiss plaintiff's suit with all costs.

The 17th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Hindoo family—Presumption of being joint—Allegation of separation—Onus probandi.

Case No. 3664 of 1864.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 9th September 1864, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 27th January 1864.

Mun Mohinee Dabee and others (Defendants), *Appellants,*

versus

Sooda Monee Dabee and others (Plaintiffs), *Respondents.*

Baboo Prosunno Coomar Sein for Appellants.

Baboos Mohindro Lall Shome and *Bhowanee Churn Dutt* for Respondents.

In a Hindoo family the presumption of law is that they are joint, and the *onus* proving that the family is separate lies on the party making such assertion. The mere fact of property standing in the name of one brother does not prove that it is his separate and self-acquired property.

THIS was a suit by a Hindoo widow for recovery of a share in what is alleged to be the ancestral family property. The defendants (who are special appellants before us) are the widows of another of the brothers, and claim on the ground that the property was self-acquired.

The accompanying genealogical table will explain the position of the parties:—

Jankeenath.

Ramdhun, Modhun Mohun, Kasheenath, Kalipuddo, Kadernath

Plaintiff is the widow of Modhun Mohun, and defendant of Kaleepuddo.

Of the five sons of Jankeenath, two, Kasheenath and Kadernath, died before their father.

Special respondent, who sues in *formâ pauperis*, alleges that her husband Ramdhun and Kaleepuddo lived together as a joint undivided Hindoo family; that Ramdhun died childless before her husband, and that, after Modhun Mohun's death, she, as his widow, became entitled to one-half of the family property, and had, indeed, retained it, living in commensality with the widows of Kaleepuddo, until the latter, by obtaining a certificate to administer to all the properties left by their husband, dispossessed plaintiff of her share.

Special appellants urge that the special respondent's husband died before his elder brother Ramdhun, and that, after the latter's death, Kaleepuddo, their husband, succeeded to all the property, having already purchased Modhun Mohun's share during his lifetime. They add that the family property consisted of 2 beegahs of land only, and all the rest of which Kaleepuddo died possessed was his own self-acquired estate.

Both Lower Courts held that the property was joint, the Judge giving the plaintiff a one-third share of all the property claimed, whereas the Principal Sudder Ameen had excluded from it certain property which he held to have been acquired by the special appellant's husband after the death of special respondent's husband.

It is urged in special appeal that the Judge has laid the *onus probandi* on the wrong party, and that the special respondent ought to have proved that the property was purchased by the joint family funds. Special appellants refer to the Full Bench ruling of this Court, dated 11th November 1862, Musst. Soobedhun Dossee, appellant (Sutherland's Weekly Reporter, Full Bench Cases, page 57).

We think there can be no doubt that in all Hindoo families the presumption of law is that they are joint and undivided, and that the *onus* of proving that a family is separate in mess and business lies on the party making such assertion; and that the mere fact of the property standing in the name of one brother does not prove that it is that one brother's separate and self-acquired property. The Judge in the present case has gone upon the ordinary presumption of Hindoo law. It is admitted that the family was joint and undivided, and he threw upon the special appellants, who claimed the property in suit, on the ground that it has been self-acquired by their husband, the *onus* of proving their allegation.

The Full Bench ruling quoted by the special appellants does not apply. In that case the Judge found, as a fact, that the property was self-acquired, and that no part of it was ancestral. In the present it is not denied that a part of the property was ancestral; and it was held not to be proved that the remainder was acquired with Kaleepuddo's separate funds.

With this finding of fact, we, of course, cannot interfere in special appeal; and, as regards the *onus*, we think that the Judge was right, and that the special appellants were bound to rebut the presumption of Hindoo Law which arose on the face of the pleadings in favor of the special respondent. Dismissed with costs.

The 17th May 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Purchaser of "Milkeut" and "Hukeequt" of former proprietor—Rights acquired by.

Case No. 3718 of 1854.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 28th September 1864, affirming a decision passed by the Sudder Ameen of that District, dated the 25th May 1864.

Ram Jhan Gunderee (Defendant), *Appellant,*

versus

Lalla Godadhur Lal and others (Plaintiffs), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Kalee Mohun Doss for Respondents.

The purchaser of the "*milkeut*" and "*hukeequt*" of a former proprietor in a village does not acquire his rights in his house or in any garden attached to the house, nor the rights to any orchard or mangoe-tope planted by the late proprietor.

THE question at issue in this case, and which is raised on special appeal, is whether the purchaser of the rights and interests of a former proprietor in a village obtains by his purchase only the proprietary rights, or also all other rights which the former proprietor may have held. The words used in the certificate of sale are that the purchase was of the "*milkeut*" and "*hukeequt*" of the former proprietor. It is admitted that this would not carry with it the rights and interests of the proprietor in his house or in any gardens attached to the house. But it is said it carries with it the rights to an orchard or mangoe-tope planted by the late proprietor. We think it must be restricted to the proprietary rights in that orchard. The late proprietor would still be entitled to retain possession, as a tenant, of the topes which he planted. We cannot see any difference between his rights to his house and garden, and his rights to the mangoe-tope. It is evident also in this case that the purchaser did not attempt to take possession of the disputed mangoe-topes when he made the purchase and took possession of the proprietary rights; but now he brings forward this claim when the mangoe-topes have been sold in execution of decree to a third party.

We reverse the Judge's decision, and restore the decree of the first Court dismissing plaintiff's suit.

Plaintiff will pay all the costs.

The 18th May 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Jurisdiction—Suit for collections of Shrines.

Case No. 1371 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Behar, dated the 12th March 1864, affirming a decision passed by the Moonsiff of that District, dated the 30th November 1863.

Sheo Subaye Dhamee and others (Plaintiffs), *Appellants,*

versus

Bhooree Muhtoon and others (Defendants), *Respondents.*

Baboo Khettur Nath Bose for Appellants.

Baboo Poorno Chunder Mookerjee for Respondents.

A suit will lie for the collections of a shrine, either in right of property in the place, or of lawful and established office attached to it.

RESPONDENT takes objection that a special appeal will not lie. But we find that this is not a suit on a contract, but a claim for the offerings at certain temples on the express ground of "*Mourosee Milkeut*" or hereditary property. It is not a suit of a Small Cause character.

The claim has been most illegally and improperly non-suited by the Courts below—illegally, because no such procedure is known to the present law, and the plaint cannot be rejected after summoning the defendant; and, further, most improperly, because the reason given is altogether frivolous, *viz.*, that plaintiff did not state the names of the pilgrims.

A suit for fees voluntarily paid to one man will not lie on the part of another, when there is neither contract nor tangible property; but, when the parties claim the collections of a shrine, either in right of property in the place, or of lawful and established office attached to it, it is well established that the suit will lie. Plaintiff's suit would seem by his declaration to be of this character, and it must be enquired into to ascertain whether it is so or not. If it is, and plaintiff's claim to the share alleged by him is established; if, moreover, it appears that the collections were made by defendants—then it will lie on the defendants to render to plaintiff an account, and pay him his share of the proceeds. Plaintiff cannot be called on for a nominal roll of collections which he did not make, or to give evidence of that which is not in his cognizance. The case is remanded for a proper trial.

The 19th May 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Limitation (Clause 14, Section 1 of Act XIV. of 1859)—Resumption or assessment of Lakheraj.

Case No. 3291 of 1864.

Special Appeal from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated the 8th August 1864, modifying a decision passed by Moulvie Tofel Ahmed, Moonsiff of that District, dated the 19th February 1864.

Krishto Mohun Doss Bukshee (Defendant), *Appellant,*

versus

Joy Kishen Mookerjee (Plaintiff), *Respondent.*

Baboo Brojendro Coomar Seal for Appellant.

Baboos Banee Madhub Banerjee and *Tarucknath Sein* for Respondent.

Clause 14, Section 1 of Act XIV. of 1859, applies to all suits to resume or assess lands held rent-free, whether before or after the Permanent Settlement.

THIS was a suit for resumption instituted on 23rd November 1863. The defendant pleads limitation, inasmuch as the suit is not brought within twelve years from the date on which the plaintiff's title accrued. The defendant does not distinctly quote Clause 14, Section 1, Act XIV. of 1859, but his words sufficiently indicate that he brings his plea under that law. In his petition of special appeal he distinctly specifies the law; and, when the suit was brought, that law was the only law of limitation in force. Section 18 of that Act provides that all suits instituted within the period of two years

from the date of the passing of the Act shall be tried and determined as if the Act had not been passed; but all suits to which the provisions of this Act are applicable, that shall be instituted after the expiration of the said period, shall be governed by this Act, and no other Law of Limitation, any Statute, Act, or Regulation now in force notwithstanding. The Act was passed on 5th May 1859, and, to avoid the effect of the limitation prescribed by the Act, it was necessary to have filed this suit on or before the 5th May 1861; but by Section 1 of Act XI. of 1861, the time was extended to the 1st January 1862. That law declared that suits instituted before 1st January 1862 were to be tried and determined as if Act XIV. of 1859 had not been passed. It is clear, therefore, that the plaintiff can derive no further immunity than he has already obtained from the provisions of Section 18 of Act XIV., and we have to determine whether the suit now brought is barred by limitation under Clause 14, Section 1 of the Act.

It is, we think, perfectly clear that the Law of Limitation (Act XIV. of 1859) is applicable to all suits, unless they be exempted from its operation by any provision of that or any other law—thus suits for the recovery of public revenue, or for public claims, are exempted by Section 17 of the Act; and suits for rent are governed by the provisions of Act X. of 1859, which contains a Law of Limitation expressly enacted for such suits. Now, looking at Clause 14, Section 1 of Act XIV. of 1859, we find it enacted that all suits by the proprietor of any land, or by any person claiming under him, for the resumption or assessment of any lakheraj or rent-free land, must be brought within the period of twelve years from the time when the title of the person claiming the right to resume and assess such lands, or of some person (*the* person) under whom he claims, first accrued. That this part of the law is applicable to Bengal is obvious from the latter part of the clause, which specially provides for suits regarding rent-free lands in *permanently settled estates*, and declares that, though they be brought within twelve years from the time when the title of the party bringing the suit accrued, they shall not be maintained if it be shewn that the land has been held lakheraj or rent-free from the period of the Permanent Settlement, *i. e.*, from 22nd March 1793.

Before coming to a conclusion, whether this suit, which is for the resumption of lands alienated subsequent to the Permanent Settlement, is barred by the new Law of Limitation, it is necessary to determine whether Clause 14, Section 1 of Act XIV. of 1859, applies to such cases, or has reference only to lands held rent-free in Bengal previous to 1790. In looking at this question, it is necessary to bear in mind that Section 10 of Regulation XIX. of 1793 has not been repealed; and that, if, in respect to these cases, there be a concurrent jurisdiction, as has been lately ruled by a majority of this Court, in the Civil Courts, and in the Collector's, a suit brought in the former for the resumption of lands separated after the Permanent Settlement is not barred by limitation, if the plaintiff be able to prove that the lands in dispute formed at any time a part of his permanently settled estate; whereas a suit before the latter under Section 28 of Act X. of 1859 is affected by limitation, if not brought within twelve years from the time when the plaintiff's title accrued. It is therefore of the greatest importance to determine whether the provisions of Clause 14, Section 1 of Act XIV. of 1859, refer only to cases held rent-free previous to 1790, or whether they operate to supersede and set aside the privilege given to lakherajdars by Section 10 of Regulation XIX. of 1793.

We think that the new Law of Limitation is applicable to all suits relative to rent-free tenures whether created previous to or subsequent to 1790. There can be no doubt that it is applicable to the former. It is, we think, equally applicable to the latter, as may be gathered from the object, the wording, and the proviso contained in the latter part of the clause. One object of the law, as it appears to us, is to assimilate the procedure of the Civil Courts with that in the Collector's Court, to make the Law of Limitation applicable equally to suits instituted in the former as in the latter, otherwise we should have the anomaly of two sets of Courts with concurrent jurisdiction trying the same class of cases, in one of which the suit might be barred by limitation, while in the other limitation could not be applied. The effect of thus assimilating the law in both classes of Courts is to put a stop to the harassment which holders of rent-free tenures under 100 beegahs have been subjected to by suits brought by zemindars and others for the resumption of lands held admittedly as rent-free for a long course of years. After so long a period has elapsed, it is almost impossible for the owners of such tenures to give satisfactory

oral or documentary proof of the creation of their title. Witnesses, who might have spoken to the fact, have long since been dead; and those who are called can only speak to the existence of the tenure as rent-free within their own knowledge which probably extends only to a few years back. Documents, which might prove the fact, have been lost or destroyed, or, if produced, do, from want of registration or other cause, share the general suspicion to which all such documents are exposed. Persons who have purchased on the faith of a good title, and have held possession undisturbed for a series of years, or the heirs of the original grantees, whose title has hitherto been unquestioned, find themselves, after time has destroyed their means of adducing sufficient proof to support that title, immersed in a vortex of litigation by parties who derive their own title from the zemindar, such as putneedars and durputneedars who have but one object in view, to increase their rent-roll.

But it may be asked, if the object of the law was to prevent further unnecessary harassment to the holders of rent-free tenures, why was Section 10 of Regulation XIX. of 1793 left unrepealed? The reason is obvious. The Legislature had also to protect the interests of a class of persons other than the holders of rent-free tenures, *viz.*, the auction-purchaser at a sale for arrears of Government revenue. Knowing the frauds to which such a person is exposed, and the difficulty he has, when obtaining possession of an estate, to discover the lands which belong to his estate at the time of the Permanent Settlement to which as purchaser he is entitled, it left to him the right to bring a suit for the resumption and assessment of such lands, so re-attaching them or their rent to the assets of his estate; and it declared that, as against his suit, if brought within twelve years from the date on which his title accrued, the occupant of lands held rent-free subsequent to the Permanent Settlement, and separated from the estate as such at any time after that date, should not be able to plead limitation. An auction-purchaser at a sale for arrears of Government revenue is entitled to receive the estate free of all encumbrances imposed subsequent to that Settlement by the previous zemindars, and no plea of long possession can hold good against him if his suit be brought within twelve years of his purchase. A person receiving a grant from Government might also, under the provisions of Clause 14, Section 1, bring a suit within twelve years from the date of such grant, to set aside a tenure held as rent-free on invalid title. But a zemindar, or a party deriving his title from a zemindar, who, with every opportunity to bring his action, has allowed time to run on, and failed to take steps to resume and assess rent-free tenures of this kind, must be held to have lost his remedy; and against his suit limitation may now be pleaded, as he failed to bring his action within twelve years from the date on which his title accrued.

Then as to the wording of the law. It declares that in suits brought by the proprietor of any land, or by any person claiming under him for the resumption or assessment of *any* lakheraj or rent-free land, "the period of twelve years from the time when the title of the person claiming the right to resume and assess such lands, or of some person under whom he claims, accrued." Now, it is clear from these words, as well as from the proviso that follows, that a suit for lands held free from assessment from a time previous to 1st December 1790 could not be entertained under any circumstances, for most zemindars, who, under the provisions of Regulation XIX. of 1793 and Regulation II. of 1819, had liberty to sue, had already allowed more than twelve years to elapse since their title accrued, and therefore in regard to such lands an action was clearly barred. But we do not think that this was all that the Legislature intended by this Section of the law passed nearly seventy years after the time for bringing such suits began to run. The law, as we read it, appears to refer to another class of cases; and these, we think, must be cases under Section 10 of Regulation XIX. of 1793, which an auction-purchaser or other party in similar favorable circumstances might bring successfully, unless the defendants were able to shew that the lands had been held rent-free from the Permanent Settlement. It is obvious, from the proviso at the close of Clause 14 of Section 1 of Act XIV. of 1859, that even an auction-purchaser could not resume lands proved to have been held rent-free from the period of the Permanent Settlement. The fact of their having been so held is sufficient to close the door to all enquiry as to the validity of the title under which the tenure is held. If, therefore, an auction-purchaser is precluded from making a resumption of such tenures, it is clear that the zemindars with whom the Permanent Settlement was made, or their representatives, are equally precluded. If then rent-free

tenures in existence at the Permanent Settlement, whether held on valid or invalid tenures, are protected equally from both these classes of zemindars, to what class of cases does the Law of Limitation prescribed by Clause 14 apply, unless it be to cases under Section 10 of Regulation XIX. of 1793? These, it appears to us, are not protected from the auction-purchaser if he bring his suit within twelve years of his purchase; but they are protected from the zemindar who has slept over his rights.

Looking, then, at the wording of the clause, and the proviso with which it closes, we think that its provisions were intended to embrace all claims to resume or assess lands held rent free, whether before or after the Permanent Settlement; that the Legislature did not rescind Section 10 of Regulation XIX. of 1793, because there might be certain persons as auction-purchasers at sales for arrears of Government Revenue, who would be entitled to receive the estate, as it stood at the Permanent Settlement, free of all encumbrances subsequently created; that, if such party brought an action to recover within twelve years from the date of his title, no length of possession by the defendant, as lakherajdar subsequent to the Permanent Settlement, could be pleaded against him as barring the suit. But if it could be shewn by the defendant that the tenure had been held as lakheraj from the period of the Permanent Settlement, the suit, though within time, could not be maintained. The rule laid down is that every person claiming a right to resume shall bring his action within twelve years from the date when his title, or of the person under whom he holds, first accrued; and it appears to us to be a general rule applicable to all parties seeking to resume. The Court will look first to the time when plaintiff's title accrued. If the action be brought after twelve years from the date of plaintiff's title, it is barred by limitation, and probably nine-tenths of the suits instituted since Act XIV. of 1859 came into force are in this predicament.

Applying the above ruling to the case before us, we find that the plaintiff is a putneedar, deriving his title from the zemindar. The zemindar's title to resume commenced at the Permanent Settlement, and he never sought to resume these lands. He cannot revive a privilege which has become extinct by his own laches by creating a putnee, nor can he confer on the putneedar a power which he himself no longer possesses. As, therefore, the right to resume has become extinct in the zemindar, we think it cannot be revived in the putneedar who derives his title from the zemindar. We therefore hold that the present suit is barred by limitation; and, reversing the order of the Lower Court, we dismiss the plaintiff's suit with all costs.

The 19th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Mesne-profits (extent of).

Case No. 3704 of 1864.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 5th September 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 20th May 1864.

Gossain Runjeet Geer (one of the Defendants), Appellant,

versus

Lalla Doorga Pershad (Plaintiff), *Respondent.*

Baboos Romesh Chunder Mitter and *Mohesh Chunder Chowdry* for Appellants.

Baboo Kalee Kishen Sein for Respondent.

A plaintiff can obtain a decree for mesne-profits only as far as his title is proved.

THIS was a suit to obtain mesne-profits of 4 annas of certain landed estate. The Lower Court has admitted that the plaintiff's title to more than 2 annas is doubtful, but on the ground of plaintiff's possession has given him a decree for wasilat for the 4 annas.

This is taken exception to on special appeal.

We think the decision cannot stand. The plaintiff can obtain mesne-profits only as far as his title is proved, *viz.*, as to 2 annas. The Lower Court's decree is amended accordingly to mesne-profits on the 2 annas with interest from date of ascertainment (not from date of institution as stated by the first Court) to date of realization.

The respondent will pay the costs of this appeal.

The 19th May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Mahomedan Law—Partition—Gift of share before.

Case No. 2741 of 1864.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 18th June 1864, affirming a decision passed by the Second Principal Sudder Ameen of that District, dated the 16th September 1863.

Musst. Ameena Bibee (one of the Defendants), *Appellant,*

versus

Musst. Zeifa Bibee (Plaintiff), *Respondent.*

Mr. G. C. Paul and *Moulvie Aftabooddeen Mahomed* for Appellant.

Baboos Anund Chunder Ghosal and *Kedarnauth Chatterjee* for Respondent.

According to the Mahomedan Law, one of two sharers can give over his share to the other even before partition.

THIS was a suit for declaration of title to certain land, which the plaintiff alleged was given by the defendant Ameena Bibee to her brother, Golam Mortoza, and, on his death, devolved upon them, the plaintiffs, as his heirs.

Both the Lower Courts found in favor of the plaintiffs. The Lower Appellate Court, in its judgment, said: "The father of "the plaintiffs and of the defendants died, "leaving one son, Golam Mortoza, and three "daughters, Homfa, Khatum, and Ameena. "The son took 6 as. 8 gds., and each of "the daughters 3 as. 4 gds. In these "proportions the lands, houses, &c., were "divided amongst them after valuation by "an arbitrator. The defendant Ameena "made a present to her brother of the whole "share accorded to her." The Lower Appellate Court then goes on to recite the contention of each party, and referring to a plea put forward by the defendant "that "the gift was *hibamusher*, that is to say, a "gift of property which is joint and un-"divided, and therefore invalid," says: "The "latter plea is inserted in the grounds of "appeal. but has not been argued orally, and "it is of no value, for it is clear on the "evidence, and indeed it is admitted, that "a partition was made of the lands, &c., "left by her father, and that her gift was "made after the partition was effected." Also, in reference to the plea of Ameena, that she gave her brother only a life-interest in her lands, the Lower Appellate Court finds there is no indication that the brother's right "in the lands was restricted in any way."

On special appeal to this Court the defendant urges:—

1st.—That the Lower Appellate Court is wrong in its construction of the arbitrator's award, inasmuch as that award does not show that any division was come to before the gift was made; at any rate it is clear from it that no division ever was made between the share of the defendant and that of her brother, and consequently the gift by her of her undivided share was void by Mahomedan Law.

2ndly.—That the terms of the gift conveyed a life-interest only, and did not constitute an absolute gift.

The gift by Ameena to her brother seems to have been made by parol, but the best evidence of it is afforded by the written decision of the arbitrator, which sets out all the essential facts of the transaction, and was accepted by all the parties to this suit at the time it was made as a correct and binding version of the matters dealt with therein. From this document it appears to us that the division of the shares and the gift by Ameena formed parts of one and the same transaction. Nothing is expressly said as to the order of time in which these two things respectively took place; and, in the absence of any statement on this point, the Court below would have been right in presuming that they took place in such order of succession as would carry out the intentions of the parties, rather than in that which would render the gift void. But we observe that the Lower Appellate Court does not decide upon mere presumption alone, for it says that it was admitted by the defendant "that the partition was made, and that her gift was made after the partition was effected." That this partition did not extend so far as to divide Ameena's share from her brother's is not important, for we hold, on the authority of Case XII. of Macnaghten's Precedents of Mahomedan Law, that one of two sharers can give over his share to the other even before division.

We, therefore, see no reason for impeaching the decision of the Lower Appellate Court with regard to the validity of Ameena's gift to her brother.

Neither, on consideration of the terms of the gift, do we think that the Lower Appellate Court was wrong in holding that it was absolute, and the conditions effective to pass all Ameena's interest, which Ameena desired to impose in restraint of alienation, &c.; do not indicate to us that she intended to reserve to herself any further or future interest in the land.

The appeal is dismissed with costs.

The 20th May 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Limitation—Mesne-profits—Cause of action.

Case No. 269 of 1864.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 21st April 1864.

Maharaj Koer Ramaput Singh (Plaintiff), *Appellant,*

versus

Mr. J. Furlong, general manager on behalf of the Rajah of Durbhanga (Defendant), *Respondent.*

Moulvie Aftabooddeen Mahomed for Appellant.

Baboo Kishen Kishore Ghose for Respondent.

Suit laid at rupees 14,965.

Under Act XIV. of 1859 mesne-profits can be decreed only for six years before institution of suit. The cause of action for the mesne-profits is the date on which they became annually due.

THE order of the Court below dismissing the suit of the appellant for mesne-profits, due more than twelve years preceding to the filing of his plaint, is correct. The plaint was filed after Act XIV. of 1859 came into operation, and under it the claim for mesne-profits can be decreed only within six years preceding the plaint. Accordingly, mesne-profits due for more than six years cannot be claimed in this case. The cause of action is neither the date of the roobakaree ordering restoration of possession as held by the Lower Court; nor does it either shew the date of the plaintiff's obtaining possession, nor the date of the final order of the Civil Courts in the regular case brought by the opposite party to set aside the said order for restoration of possession as argued by the plaintiff. The cause of action for the mesne-profits is the date on which they became annually due. The plaintiff cannot claim any deduction in this case for the period during which the previous litigation commenced by others was pending in different Courts. The appeal is accordingly rejected with costs.

The 22nd May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Vakeel (absence of).

Case No. 31 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 19th September 1864.

Koroona Moyee Dossee, Pauper (Plaintiff), *Appellant,*

versus

Ali Nukee Merdha (Defendant), *Respondent.*

None for Appellant.

Baboo Bungsheedhur Sein for Respondent.

Suit laid at rupees 9,150.

A case duly called on cannot be allowed to be postponed by reason of absence of the appellant or his vakeel.

THE pleader, Baboo Mohesh Chunder Bose, is not present. It is stated that he has leave to be absent. He has never received such leave from this Bench. If he had, it was his duty to provide that another vakeel should take his case, or to have seen that the printed Rule, that two vakeels should be appointed in each case, should be attended to. The appellant herself has been duly called, and has not appeared.

We distinctly are of opinion that there is no reason for allowing a case which has been duly called up in its turn to be postponed, because the vakeel and client have neglected to do their duty.

We accordingly dismiss this case with costs.

The 25th May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Res adjudicata (what constitutes).

Case No. 44 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Rungpore, dated the 22nd November 1864.

Chunder Shekhur Deb Roy (Plaintiff), *Appellant,*

versus

Doorgendro Deb and others (Defendants), *Respondents.*

Messrs. R. V. Doyne and *S. Fenn* for Appellant.

Baboos Chunder Madhub Ghose and *Hem Chunder Banerjee* for Respondents.

Suit laid at rupees 48,600.

In order to constitute a *res adjudicata* with regard to a plaintiff's claim, it must have been raised by a previous suit in a Court competent to entertain it, and been determined by the judgment of the Court in that suit; or, if it never has been expressly raised in a previous suit, it must be such as the plaintiff might and ought to have combined with the claim which was actually made and decided in such suit, if he ever intended to avail himself of it.

THE plaintiff in this case sought to set aside a certain "*bhatee* sunnud" set up by the defendants, on the ground that it was a forgery, and to recover possession of the land which formed the subject thereof.

The defendants raised three defences:

1st.—That the sunnud was not a forgery.

2nd.—That the matter was *res judicata.*

3rd.—That the suit was barred by the limitation of time.

The Principal Sudder Ameen considered that the defendants had made out both the *2nd* and *3rd* defences: he, therefore, decreed in favor of the defendants without investigating the question as to the forgery. The plaintiff now appeals against the Principal Sudder Ameen's decision.

Now, in order to constitute a *res judicata* with regard to a plaintiff's claim, it must have been raised by a previous suit in a Court competent to entertain it, and been determined by the judgment of the Court in that suit; or, if it never has been expressly raised in a previous suit, it must be such as the plaintiff might and ought to have combined with the claim which was actually made and decided in such suit, if he ever intended to avail himself of it. (*See* Judgment of Willes, J., in Nelson *versus* Couch, 10 Ju. N. S. 366, and of the High Court, Madras, in Udaiza Tevar *versus* Katama Nailuzar, Stokes's Madras Reports, Volume II., page 131).

In the present suit, the plaintiff claims the right to the possession of the lands which are mentioned in the plaint, and asks to have the "rent-free" *bhatee* title to the same lands, which had in a former suit been set up by the present defendants, declared null and void.

It is also undisputed that the plaintiff's father summarily sued the defendant's ancestor for arrears of rent in respect of a portion of the land in question, and obtained an adverse decree. After his death, the Court of Wards, on behalf of the present plaintiff who was then a minor, sued in the Civil Court, under Section 17 of Regulation VII. of 1799, to reverse the summary decree, and obtained a decision in his favor. Against this decision, the defendants appealed, and the Appellate Court reversed the decision of the first Court. The question now is, whether or not the judgment of that Appellate Court dealt with and determined the claim which the plaintiff makes in the present suit?

In the regular suit under consideration, the plaintiff claimed arrears of rent *simpliciter*, and these they might have been entitled to under a title very different from that upon which the plaintiff now sues; but they were met by the defence that the land in question had been granted by the plaintiff's father to the defendant's ancestor as *bhatee* or maintenance allowance for himself and family.

It thus became necessary to decide the issues whether or not the defendant's *bhatee* claim was well founded, and the Court of appeal determined that it was. This, it appears to us, is identical with the issue raised between the parties in the present suit; and, as it was decided by a competent Court, we must hold that the matter is now *res judicata.* Therefore, the present suit is barred, although it may be that the validity or authenticity of the *bhatee* sunnud is still open to being questioned, if necessary, in relation to any *other matter* than the right to rent there decided.

The appeal is dismissed with costs.

Neither, on consideration of the terms of the gift, do we think that the Lower Appellate Court was wrong in holding that it was absolute, and the conditions effective to pass all Ameena's interest, which Ameena desired to impose in restraint of alienation, &c.; do not indicate to us that she intended to reserve to herself any further or future interest in the land.

The appeal is dismissed with costs.

The 20th May 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Limitation—Mesne-profits—Cause of action.

Case No. 269 of 1864.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 21st April 1864.

Maharaj Koer Ramaput Singh (Plaintiff), *Appellant,*

versus

Mr. J. Furlong, general manager on behalf of the Rajah of Durbhanga (Defendant), *Respondent.*

Moulvie Aftabooddeen Mahomed for Appellant.

Baboo Kishen Kishore Ghose for Respondent.

Suit laid at rupees 14,965.

Under Act XIV. of 1859 mesne-profits can be decreed only for six years before institution of suit. The cause of action for the mesne-profits is the date on which they became annually due.

THE order of the Court below dismissing the suit of the appellant for mesne-profits, due more than twelve years preceding to the filing of his plaint, is correct. The plaint was filed after Act XIV. of 1859 came into operation, and under it the claim for mesne-profits can be decreed only within six years preceding the plaint. Accordingly, mesne-profits due for more than six years cannot be claimed in this case. The cause of action is neither the date of the roobakaree ordering restoration of possession as held by the Lower Court; nor does it either shew the date of the plaintiff's obtaining possession, nor the date of the final order of the Civil Courts in the regular case brought by the opposite party to set aside the said order for restoration of possession as argued by the plaintiff. The cause of action for the mesne-profits is the date on which they became annually due. The plaintiff cannot claim any deduction in this case for the period during which the previous litigation commenced by others was pending in different Courts. The appeal is accordingly rejected with costs.

The 22nd May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Vakeel (absence of).

Case No. 31 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 19th September 1864.

Koroona Moyee Dossee, Pauper (Plaintiff), *Appellant,*

versus

Ali Nukee Merdha (Defendant), *Respondent.*

None for Appellant.

Baboo Bungsheedhur Sein for Respondent.

Suit laid at rupees 9,150.

A case duly called on cannot be allowed to be postponed by reason of absence of the appellant or his vakeel.

THE pleader, Baboo Mohesh Chunder Bose, is not present. It is stated that he has leave to be absent. He has never received such leave from this Bench. If he had, it was his duty to provide that another vakeel should take his case, or to have seen that the printed Rule, that two vakeels should be appointed in each case, should be attended to. The appellant herself has been duly called, and has not appeared.

We distinctly are of opinion that there is no reason for allowing a case which has been duly called up in its turn to be postponed, because the vakeel and client have neglected to do their duty.

We accordingly dismiss this case with costs.

The 25th May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Res adjudicata (what constitutes).

Case No. 44 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Rungpore, dated the 22nd November 1864.

Chunder Shekhur Deb Roy (Plaintiff), *Appellant,*

versus

Doorgendro Deb and others (Defendants), *Respondents.*

Messrs. R. V. Doyne and *S. Fenn* for Appellant.

Baboos Chunder Madhub Ghose and *Hem Chunder Banerjee* for Respondents.

Suit laid at rupees 48,600.

In order to constitute a *res adjudicata* with regard to a plaintiff's claim, it must have been raised by a previous suit in a Court competent to entertain it, and been determined by the judgment of the Court in that suit; or, if it never has been expressly raised in a previous suit, it must be such as the plaintiff might and ought to have combined with the claim which was actually made and decided in such suit, if he ever intended to avail himself of it.

THE plaintiff in this case sought to set aside a certain "*bhatee* sunnud" set up by the defendants, on the ground that it was a forgery, and to recover possession of the land which formed the subject thereof.

The defendants raised three defences:

1st.—That the sunnud was not a forgery.

2nd.—That the matter was *res judicata.*

3rd.—That the suit was barred by the limitation of time.

The Principal Sudder Ameen considered that the defendants had made out both the *2nd* and *3rd* defences: he, therefore, decreed in favor of the defendants without investigating the question as to the forgery. The plaintiff now appeals against the Principal Sudder Ameen's decision.

Now, in order to constitute a *res judicata* with regard to a plaintiff's claim, it must have been raised by a previous suit in a Court competent to entertain it, and been determined by the judgment of the Court in that suit; or, if it never has been expressly raised in a previous suit, it must be such as the plaintiff might and ought to have combined with the claim which was actually made and decided in such suit, if he ever intended to avail himself of it. (*See* Judgment of Willes, J., in Nelson *versus* Couch, 10 Ju. N. S. 366, and of the High Court, Madras, in Udaiza Tevar *versus* Katama Nailuzar, Stokes's Madras Reports, Volume II., page 131).

In the present suit, the plaintiff claims the right to the possession of the lands which are mentioned in the plaint, and asks to have the "rent-free" *bhatee* title to the same lands, which had in a former suit been set up by the present defendants, declared null and void.

It is also undisputed that the plaintiff's father summarily sued the defendant's ancestor for arrears of rent in respect of a portion of the land in question, and obtained an adverse decree. After his death, the Court of Wards, on behalf of the present plaintiff who was then a minor, sued in the Civil Court, under Section 17 of Regulation VII. of 1799, to reverse the summary decree, and obtained a decision in his favor. Against this decision, the defendants appealed, and the Appellate Court reversed the decision of the first Court. The question now is, whether or not the judgment of that Appellate Court dealt with and determined the claim which the plaintiff makes in the present suit?

In the regular suit under consideration, the plaintiff claimed arrears of rent *simpliciter*, and these they might have been entitled to under a title very different from that upon which the plaintiff now sues; but they were met by the defence that the land in question had been granted by the plaintiff's father to the defendant's ancestor as *bhatee* or maintenance allowance for himself and family.

It thus became necessary to decide the issues whether or not the defendant's *bhatee* claim was well founded, and the Court of appeal determined that it was. This, it appears to us, is identical with the issue raised between the parties in the present suit; and, as it was decided by a competent Court, we must hold that the matter is now *res judicata.* Therefore, the present suit is barred, although it may be that the validity or authenticity of the *bhatee* sunnud is still open to being questioned, if necessary, in relation to any *other matter* than the right to rent there decided.

The appeal is dismissed with costs.

The 25th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Mahomedan Law—Death-bed Mokurruree Leases—Pleadings—High Court (Power of).

Case No. 3462 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Behar, dated the 2nd September 1864, reversing a decision passed by the Sudder Ameen of that District, dated the 15th January 1863.

Molk Enaet Hossein (Defendant), *Appellant,*

versus

Musst. Kureemoonissa (Plaintiff), *Respondent.*

Mr. C. Gregory for Appellant.

Messrs. R. V. Doyne and *R. E. Twidale* for Respondent.

A mokurruree lease, extended when the grantor was dangerously ill and in contemplation of death, was held to be a death-bed gift, and his natural heirs declared incapable of taking anything under it except their shares of the defendant's property according to Mahomedan Law.

The High Court can raise and adjudicate upon such points in special appeal when they are apparent on the face of the pleadings, even though the parties to the suit are silent.

THE plaintiff in this case (special respondent before us) sued to set aside a mokurruree lease said to have been executed by one Lall Mahomed in favor of his grand-children, the present special appellants.

The lease comprised a 2-annas 13 d. share of Khajapore Dhomul, a similar portion of Huskaleepore Salah, and a 2-annas 1 d. 10 ch. share of Audoos, and it is not denied that these shares represented all his property.

At the first trial of the case, the mokurruree lease was treated as a will, and declared good only to the extent of one-third of the property conveyed by it. But, on appeal, the Judge gave the grand-children a decree for the whole.

It then came up in special appeal to this Court, by which (12th May 1864) it was remanded to find whether the mokurruree was a gift on the part of Lall Mahomed, and whether it was made whilst suffering from a malady which proved fatal; whether, in short, the conveyance came under the meaning of a death-bed gift, and, as such, good only to a certain extent, and whether possession passed under it.

The Principal Sudder Ameen has now decided that the mokurruree deed itself is spurious, and that the special appellants never held possession of the land.

It is urged before us in special appeal:—

(1.)—That the question of the genuineness of the mokurruree lease was not in issue on remand, having been finally disposed of by both Lower Courts; that the Principal Sudder Ameen was restricted to finding whether the donor, at the time the mokurruree was granted, was in contemplation of death, so as to make the grant of the nature of a death-bed gift; and whether the grant had been supplemented by *seisin;* and

(2.)—That the question of possession had not been fairly decided, the Lower Court having proceeded entirely on the fact that the deed was not executed.

With regard to the first objection, we think that the special appellant has reason to complain. The execution of the mokurruree lease had been found, as a fact, by both the Lower Courts, and no question as to its genuineness was raised in special appeal. The case was remanded for enquiry into the circumstances under which the deed was given—whether or not, at the time of giving it, the donor was in that state of illness as made death a probable result; whether, in short, he gave the lease in contemplation of death, in which case it would have been by Mahomedan Law *donatio mortis causâ,* and only operative as a will.

There is, we think, sufficient evidence on the record to enable us to come to a conclusion on this point. Whatever may have been the precise nature of Lal Mahomed's disease, it is abundantly clear that he was very ill when he executed the mokurruree; and that he died within six months afterwards, without mending during the interval: in other words, he was, when he executed the deed, on what proved to be his death-bed. There is no proof, we observe, that he was *non compos mentis* at the time, nor does the Principal Sudder Ameen say that he was so; but that he was very ill, there can be no doubt.

Under such circumstances, the presumption would undoubtedly be that the gift was made in contemplation of death, and that it can only operate as a will, and pass one-third of the property. (*Vide* Ashrufoonissa *versus* Musst. Ajeemun, Sutherland's Weekly Reporter, 13th August 1864, page 17.)

This being our opinion, it is unnecessary to go into the second ground of special appeal, as a gift of the description above noted

would be the same thing as a legacy, and seizin would not accompany the gift.

But we also think that, under the circumstances, the special appellant must fail in this suit, although we may admit that the owner of the property, Lall Mahomed, was capable of conveying it, on the undoubted maxim of Mahomedan Law, that (*vide* Macnaghten's Mahomedan Law, Chapter V., page 51) no one can make a gift of any part of his property on his death-bed to one of his heirs, it not being lawful for one heir to take a legacy without the consent of the rest. Now, the special appellants in this case are Lall Mahomed's grand-children, and, as such, his heirs in conjunction with the other members of the family; and, if they are allowed to take the one-third under the mokurrureee as a death-bed gift, it is manifest that the co-heirs would be damaged to that extent.

It may be urged that this ground of objection has never been taken by those interested. But the law permits this Court to raise and adjudicate upon such points, when they are apparent on the face of the pleadings, even when the parties to the suit are silent. Indeed, were we not to take this question into consideration, we should be deciding the suit on grounds diametrically opposed to the law which we are bound to administer.

We think, therefore, that the mokurrree having been executed when Lall Mahomed was dangerously ill, and in contemplation of death, can only be considered in the light of a death-bed gift; and, that being the case, the special appellants, who are with others the natural heirs of the donor, cannot take anything under it, but must be satisfied with such share of the deceased's property as Mahomedan Law gives them.

The special appeal is dismissed with costs.

The 25th May 1865.

Present:

The Hon'ble C. B. Trevor and J. P. Norman, *Judges.*

Lessee (Rights of)—Principals and Agents—Shareholders (Powers of)—Manager (Revocation of appointment of)—Partition.

Case No. 250 of 1864.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Monghyr, Zillah Bhaugulpore, dated the 20th August 1864.

Bulakee Lall and others (Plaintiffs), *Appellants,*

versus

Mussamut Indurputtee Kowar and others (Defendants), *Respondents.*

Mr. C. Gregory and *Baboo Unnodapershad Banerjee* for Appellants.

Baboos Dwarkanath Mitter and *Chunder Madhub Ghose* for Respondents.

A lessee can take no greater rights than his lessor, and is bound by the decree in a suit against his lessor to the same extent as the latter.

A principal can determine at his mere pleasure the authority given to an agent. So one shareholder cannot resist the revocation by another shareholder of the authority given to a manager, their being no stipulation in the deed providing for the appointment of a manager, that the authority should continue for any definite time.

Any act or declaration showing an unequivocal intention on the part of any shareholder to hold or enjoy his own share separately, and to renounce all rights upon the shares of his co-parceners, constitutes a complete severance or partition.

THE plaintiff sues to recover two annas of talooka Kuttree Iktyarpore, to which he claims to be entitled under two leases, dated respectively the 7th Choitro 1267, and the 3rd Joistee 1268 Fuslee, executed by Nawab Singh and others.

The defendant Indurputtee Kowar claims the same property under a zur-i-peshgee lease granted by Indurjeet Singh on the 12th Assin 1266 (October 1858) to secure rupees 10,000 borrowed by him to defray the marriage expenses of his daughter.

The property in question is a part of four annas of the talook which was purchased in the name of Gunnesh Dutt, the father of Indurjeet Singh. Before the date of the defendant's lease, *viz.*, in September 1858, Nawab Singh and others, brothers of Gunnesh Dutt, brought a suit against Indurjeet Singh, alleging that the property, though standing in the name of Gunnesh Dutt, was not his, but purchased by Maghoo Singh, their father, in his name. This suit ended in a compromise, in pursuance of which, on the 13th of June 1859, a decree was passed that, of the said four-anna share, four annas should belong to the said Indurjeet and Lutchmun Singh his brother, and that, of the remaining twelve annas, each of the other sons of Maghoo Singh should receive two annas eight gundahs; that the parties were

to take possession of their shares from that day.

The solenamah also contained clauses as follows: "It is necessary that one man should "be appointed general manager. As Rada "Singh (the eldest surviving son of Maghoo) "is the eldest and wisest of us all, and very "honest, he is appointed as the manager; he "will collect the rents, pay the necessary "expenses, and out of what remains in his "hands, he will render an account every "three months. If any shareholder is dis-"satisfied with the management of the mana-"ger on account of fraud or dishonesty, he "has a right to revoke his authority; in such "case he will collect separately, but will pay "the Government revenue jointly. After "Rada Singh, Indurjeet will succeed him "as manager, &c. The manager will grant "pottahs to the ryots and leases to the far-"mers, and the sunnuds of appointment of "the servants will bear the signature of the "general manager, and shall be given with "the consent and advice of the other co-"sharers. Debts shall be paid from the ge-"neral fund, for whatever debts may be "contracted subsequent to the deed, the "party contracting them shall alone be liable. "If there be any occasion for borrowing "for general purposes, all the co-sharers will "borrow together, and shall be jointly "liable."

The Principal Sudder Ameen dismissed the suit, on the grounds that the deed of arrangement was still in force, and that no evidence had been given on the part of the plaintiffs to prove the authority of their lessor to grant the pottah.

The plaintiffs appeal.

We think that they are entitled to a decree. The lessors were legally entitled to the property in dispute at the date when leases were granted.

Without entering into the question whether the zur-i-peshgee lease by Indurjeet Singh, set up by the defendants, is a genuine and *bonâ fide* document; and, assuming it to be so, it was executed after the institution of the suit against Indurjeet. The defendant can, therefore, take no greater rights than their lessors had, and are bound by the decree in the suit against Indurjeet to the same extent that he himself is. The deed providing for the appointment of a manager contains no words disabling the shareholder from interference in the management, or restraining any one of them from revoking the authority of the managers as far as regards his share at any time. It is clear that the manager as such could not successfully object to the revocation of his authority. It is a well-known principle of law that a principal has a right to determine the authority given to an agent at his mere pleasure; for since the authority is conferred by his mere will, and is to be executed for his own benefit and his own purposes, the agent cannot insist upon acting when the principal has withdrawn his confidence, and no longer denies his aid. (*See* Story on Agency, Section 464, &c.) Neither could any co-sharers resist the revocation of the authority given to the manager, there being no distinct stipulation that the authority should continue for any definite time. The parties are not in a position substantially different from that of a joint Hindoo family. In such cases a separation may, at any time, take place at the will of any member of the joint family. And any act or declaration, showing an unequivocal intention on the part of any shareholder to hold or enjoy his own share separately, and to renounce all rights upon the shares of his co-parceners, constitutes a complete severance or partition. In the Vyuvuharee Muyooku, translated by Borradaile, p. 52, it is said that, even when there is no property, a partition may be made by a mere declaration—"I am separate from thee." *See* also the same work, p. 110.

It was, however, contended before us that the zur-i-peshgee lease was confirmed by the clauses in the solenamah, which provides that all debts should be paid out of the common fund. We need not express our opinion whether or not this debt is one of those which were contemplated by this provision. It may or may not be that the defendant Indurputtee has a right to be paid out of the common fund arising from the income of the property to be distributed. Be that as it may, we think it clear that it never could have been the intention of the parties to the solenamah that the shares which were allotted to the plaintiff by the decree in pursuance of that instrument were to be taken, not absolutely, but subject to unknown encumbrances created by Indurjeet. If that were otherwise, the compromise would have been wholly illusory.

We think, therefore, that the clause which provides that debts should be paid from the general fund was not intended to keep alive any securities for such debts being encumbrances wrongfully created by Indurjeet upon the shares surrendered by him.

The plaintiff is, therefore, entitled to a decree with costs in all the Courts and interest.

The 25th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Hindoo Law (succession)—Whole and Half-brothers and Nephews—Minors (Right of Suit by)—Laches of Guardian.

Special Appeals from a decision passed by the Judge of Dacca, dated the 16th September 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 29th August 1862.

Case No. 3595 of 1864.

Kylash Chunder Sircar (Plaintiff), *Appellant,*

versus

Gooroo Churn Sircar and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Kishen Doyal Roy* for Appellant.

Baboos Chunder Madhub Ghose and *Romes Chunder Mitter* for Respondents.

Case No. 3684 of 1864.

Gooroo Churn Sircar and others (Defendants), *Appellants,*

versus

Kylash Chunder Sircar and others (Plaintiffs), *Respondents.*

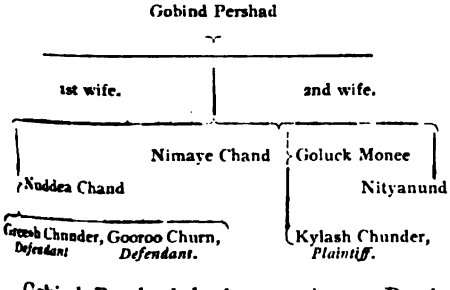
Baboos Onoocool Chunder Mookerjee and *Kalee Mohun Doss* for Appellants.

Baboos Sreenath Doss and *Kishen Dyal Roy* for Respondents.

In cases of property undivided and immoveable, uterine and half-brothers succeed equally. Where no brothers are living, the nephews of the whole blood have a preferential right to succeed over those of the half-blood.

A minor when he comes of age is not precluded from suing in his own name for anything that his guardian, either through ignorance or negligence, has omitted to prosecute.

The accompanying genealogical table will assist the consideration of these cases:—



Gobind Pershad had two wives. By the first, he left a son named Nuddea Chand, who, in his turn, had two sons, Greesh Chunder and Gooroo Churn, the present special appellants.

By his second wife he had two sons, Nimaye Chand and Nityanund. Nityanund died childless in 1255 B. S., and the present suit was brought by Goluck Monee, as mother and guardian of Kylash Chunder, the son of Nimaye Chand, for possession of the entire property left by Nityanund as nearest of kin.

Both Lower Courts found that the plaintiff Kylash Chunder was a minor at the time the suit was instituted, and that his mother and guardian rightly brought the suit, and that, according to Hindoo Law, the uterine brother had a preferential right to succeed over the brother of the half-blood, and *pari passu* the son of such uterine brother. With regard to the share of a house, and of certain monies claimed by the plaintiff, the Judge held the suit not to be proved.

Both sides appeal specially, the plaintiff under Section 348 of the Civil Procedure Code, the defendants in the regular course.

We will consider the grounds of appeal urged by the defendants first. They are (1) that the question of the plaintiff's majority has been wrongly decided, and (2) that, according to Hindoo Law, the brothers of the half-blood would take equally with the brothers of the full blood any property left by one of their number, and that the same principle would apply to nephews.

The first objection may be disposed of very shortly. The Judge found as a fact, on the evidence, that the plaintiff was not of full age when his mother instituted the suit in his behalf; and, besides, whatever Goluck Monee's laches may have been in regard of time, her son has now attained majority, and has taken his mother's place, and the present suit has been regularly tried in his presence. Moreover, limitation would not be counted against a minor, because his guardian, either from neglect or ignorance, omitted to bring a suit within time during his minority. He would still, when arrived at majority, be entitled to bring a suit on his own account. In no point of view, therefore, are the defendants' (special appeallants') objections on this head tenable.

In support of the second objection, the special appellants have produced a number of extracts from the works of Hindoo Commentators, which it will be as well to go through *seriatim,* joining with them those

authorities relied on by the special respondent, and thus bringing into juxtaposition all that is advanced by either side. The point involved is one of very great importance, and the grounds on which its decision rests should be distinctly referable to authority which no Hindoo can repudiate.

In support of the claim of brothers of the half-blood to succeed equally with uterine brothers to the property of a deceased brother, in all cases where the estate is joint and undivided—and in the present suit it is admitted on all hands that, when Nityanund died in 1255 B. S., the family was joint and undivided, separation not having taken place till 1258 B. S.—the following authorities are quoted:—

Vyavasta Durpana, page 187.

Colebrooke's Dyabhaga, Chapter XI., Section V., para. I. "On failure of her (*i. e.*, the mother) it (*viz.*, the inheritance) goes to the brothers."

And para. 10 holds that the term 'brothers' is applicable both to the whole and to the half-blood, thus—"The text of Yajvya Walcya also shows that the term 'brother' is applicable both to the whole and to the half-blood;" else if it intended only the uterine, and of course, whole brother, the author would not have specified that the "uterine brother should retain or deliver the allotment of his uterine relation;" for the whole blood would be signified by the single term "brother."

"Therefore, the succession of brothers, whether of the whole or of the half-blood, is declared by the passage before cited."

Again, Yama, one of the most ancient Commentators, says: "The whole of the *undivided immoveable* estate appertains to all the brethren, but divided immoveables must, on no account, be taken by the half-brother."

"All the brethren" is explained in the next paragraph (Para. 36, Dyabhaga, Chapter XI.) to mean all "whether of the whole blood or of the half-blood."

And the text is similarly explained in Colebrooke's Digest, Volume III., page 518, thus: "The meaning is that, if any immoveable property of divided heirs, common to brothers by different mothers, have remained undivided, being held in co-parceny, the half-brothers shall have equal shares with the rest, but the uterine brother has the sole right to the *divided* property, moveable or immoveable."

Following this is a case quoted in Volume II., Macnaghten's Hindoo Law, page 66, wherein it is laid down as prevailing law, that, where the property is undivided, half-brothers share equally with whole brothers.

For the other side, it is contended that the weight of authority is in favor of the uterine brother's preferential right, and the following precedents are quoted:—

Macnaghten's Hindoo Law, Volume I., page 26.

"In default of father and mother, brothers inherit:—*first*, the uterine associated brethren; *next*, the unassociated brethren of the whole blood; *thirdly*, the associated brethren of the half-blood; and *fourthly*, the unassociated brethren of the half-blood."

Elberling's Treatise on Inheritance, page 78, in which precisely the same words are used.

Dya Krama Sangraha, page 15, para. 5—"Where uterine and half-brothers compete, and both were associated with the deceased, the associated whole brother exclusively takes the inheritance."

Special respondent also refers to page 187 of the Vyavasta Durpana, and quotes Dyatotwa, page 54—"The uterine brother is, however, first to inherit: for, although brothers of the whole and half-blood are begotten by the same father, yet, as the uterine brother offers oblation cakes to six ancestors of the deceased, the succession first devolves on him exclusively, and not on the brother of the half-blood who offers oblation cakes to three ancestors only."

In these quotations there is, no doubt, a great *prima facie* conflict of authority. But a careful examination of the texts adduced by the special respondents shews, we think, that the preferential right to succession by brothers of the whole blood depends altogether on the nature of the estate; and that as there is no specific mention in those texts that the estate, the succession of which is in question, is an *undivided immoveable* one, it is only a fair deduction that, as other texts of superior authority distinctly limit the uterine brother's preferential right to property divided and moveable, to hold that the authors of the Dyatotwa and Dya Krama Sangraha refer to that description of estate, and do not claim for uterine brothers a larger right than for brothers of the half-blood when the property is undivided and immoveable. And this interpretation is consonant with reason and natural law. The property being ancestral and undivided, the deceased brother's share represents something that descended to him from his father, and was not acquired by any exertions of his own. It

was emphatically the father's property; and, as all the brothers, both uterine and of the half-blood, stood in the same degree of relationship to the original owner of the property, it is but reasonable that any part of that property, which circumstances may cause to be divided, should be apportioned equally amongst all the sons.

But, were the difficulty of reconciling the apparently contradictory texts above quoted insuperable, the question would still remain as to the relative weight of authority. Now, the Dyabhaga is the leading Law Commentary of Bengal; its authority is supreme, and no Hindoo of the Lower Provinces would venture to call it in question. Again, the text of Yama is entitled to every respect. He was one of the twenty sages who composed the *Sanhitas* from which the "*Dhurma Shastra*," or general body of the law, was compiled. These sages were, and are believed by the Hindoos to have been, divinely inspired, and their expounding of the law is held everywhere, where the Bengal Law prevails, to be indisputable.

So that, even if the authorities quoted on the other side do refer to cases of undivided immoveable estates of which there is no proof, still, as they are opposed to the texts of much higher authority, they would have to be put aside.

In a word, therefore, as the highest authorities on ancient Hindoo Law expressly state that both uterine and half-brothers succeed equally to a deceased brother's share when the estate is undivided and immoveable, and as the other authorities quoted to prove the contrary do not mention the description of estate to which the brothers of the whole blood would have the preferential right to succeed, we are of opinion that the latter texts refer to estates which are not undivided and immoveable, or to cases where all the brothers were not associated, and that, therefore, the brother of the half-blood of Nityanund, Nuddea Chand, would, had he survived, have been entitled to succeed equally with the uterine brother Nimaye Chand.

There remains the question touching the inheritance of the brother's sons. Admitting that uterine and half-brothers succeed equally to undivided immoveable estate, do their sons stand in the same category, or has one a preferential right over the other?

On this point all the Commentators seem to agree; and we have been unable to find, nor has the special appellant's pleader been able to show us, any authority for extending to sons of half-brothers equal rights with those of brothers of the whole blood.

In support of the preferential right of sons of a brother of the whole blood, we find in the Dyabhaga the following passage:—

"Among these (*i. e.*, the nephews) the succession devolves first on the son of a uterine brother; but, if there be none, it passes to the son of the half-brother, for the text expresses 'an uterine brother shall retain or deliver the allotment of his uterine relation.' Indeed, the son of the half-brother, being a giver of oblations to the father of the late proprietor, together with his own grand-mother, to the exclusion of the mother of the deceased owner, is inferior to the son of a whole brother who is a giver of oblations to the grand-father in conjunction with the mother of the deceased." (Dyabhaga, Section 6, para. 2, pages 212-13).

So also the Dya Krama Sangraha, Section 8, page 15—

"In default of brothers, the brother's son of the whole blood is the successor, and not a nephew of the half-blood who confers less benefits compared with the brother's son of the whole blood, since the mother and grand-mother of the deceased owner do not participate in the oblations presented by the nephew of the half-blood to the father and grand-father."

Para. 6 is even stronger on the same point: "Where two nephews were either associated or unassociated with the deceased, one of the whole, the other of the half-blood, then, in both instances, the succession devolves on the nephew of the whole blood."

Again, Colebrooke, in his Digest, Volume III., page 524, remarks: "In respect of immoveable undivided property, no author has said that nephews of the whole and half-blood have equal claims by parity of reasoning as in the case of brothers, and the text of the Legislator is not explicit on this point."

It would appear from these authorities—authorities which have not been controverted—that there is, under Hindoo Law, no analogy between whole and half-brothers and their respective sons; and that, whilst there are some authorities which might, at first sight, seem to make the whole brothers succeed in preference to those of the half-blood, all are agreed that, when the succession devolves on nephews, those of the whole blood peremptorily exclude those of the half-blood.

Taking this view of the case, we might have contented ourselves with citing the

authorities in support of the whole blood's succession. But, as in the course of the argument, exception was taken to a decision of this Court (reported in Sutherland's Weekly Reporter, Volume II., page 151) which affirmed the principle that uterine and half-brothers succeeded equally to the undivided immoveable estate of the deceased brother, we have thought it right, as the question is one of considerable importance, to go into the authorities, and explain the law of the case more at length than in that decision.

We are of opinion, therefore, that in cases of property undivided and immoveable, which is the case disclosed by the pleadings in this special appeal, uterine and half-brothers succeed equally to the estate; but that, where there are no brothers living, the nephews of the whole blood have a preferential right of succession over those of the half-blood.

On this view of the law, Kylash Chunder, the special respondent, is entitled to succeed to his uncle's estate; and we accordingly confirm the order of the Judge, and dismiss this special appeal with costs.

With regard to the cross-appeal filed by Kylash Chunder, we observe that the finding of the Judge was one of fact on the evidence, and with this there is no interference possible in special appeal.

There remains the special appeal of Kylash Chunder, and on this point we think that the Judge was clearly wrong. He threw out a certain portion of the claim on the ground that it ought to have been included in the original suit brought by Goluck Monee; and that, as it was not so included, Kylash the son was barred by Section 7 of Act VIII. of 1859 from preferring it.

On this we observe that, when Goluck Monee instituted the suit on behalf of Kylash, the latter was a minor; and there is no law that prevents a minor, when he comes of age, suing in his own name for anything that his guardian, either through ignorance or negligence, has omitted to prosecute. If this were the law, no minor would be safe; and we do not see how Kylash, when he attained majority, was debarred from claiming, and that in the suit originally instituted by his guardian, such property as that guardian had omitted in the schedule of plaint.

On this objection, the case must be remanded in order that the Judge may try the question of Kylash's right to the extra property claimed, subject, of course, to the remarks on the nature of property claimable by nephews of the whole blood, preferentially to those of the half-blood noted in the body of our judgment in the appeal of Grees Chunder.

The 25th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Case No. 3717 of 1864.

Jurisdiction (of Small Cause Courts)—Limitation—Deduction of time of closing of Courts.

Special Appeal from a decision passed by the Principal Sudder Ameen of Behar, dated the 6th September 1864, affirming a decision passed by the Sudder Ameen of that District, dated the 16th January 1864.

Musst. Maneerun (Plaintiff), *Appellant,*

versus

Musst. Luteefun (Defendant), *Respondent.*

Messrs. R. E. Twidale and *C. Gregory* for Appellant.

Baboo Grish Chunder Ghose for Respondent.

Suit for contribution below 500 rupees, and also to set aside an alleged collusive sale by the defendant. Appeal dismissed, it being held that the addition in the plaint, regarding the cancelment of the sale, was mere surplusage only intended to evade the jurisdiction of the Small Cause Court, and to secure an appeal not permitted by law.

The time that the Courts are closed must be deducted in computing the period of limitation.

THIS was a suit by the special appellant (plaintiff in the Court below), as purchaser of a right of action, to recover a sum paid by her vendor in excess of his quota in respect of a decree passed against Ashruf Ali and the defendant jointly, and which decree the vendor Kulb Ali satisfied with his own funds. Special appellant claimed rupees 320 odd on this account, and also to have cancelled a deed of sale under which the property of Luteefun had been collusively made over to a third party.

Both Lower Courts held that the sale was valid, and that a decree could only be given against Luteefun personally. And the plaintiff appeals specially against that part of the Lower Court's order which refuses to cancel the sale of the property.

An "*in limine*" objection is taken by the special respondent to the hearing of this appeal on the ground that the suit was pro-

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perly one for contribution, and of a nature cognizable by a Small Cause Court, from which Court's order (the amount being under rupees 500) no appeal would lie, and that the addition to the plaint for the cancelment of the sale was not included in the valuation of the suit, but is so much surplusage foisted in to take the suit out of the category of Small Cause Court cases.

To understand this objection, it is necessary to go somewhat into the details of the case.

It appears from the record that Ashruf Ali sued Shahadut Hossein, Luteefun his wife, Kaneej Fatmah his daughter, and one Kulb Ali, co-sharers in the property, for their quotas of rent, which he, Ashruf Ali, had been obliged to pay to save the estate from sale.

Luteefun's defence was that she was not in possession of the property, and that neither her daughter Kaneej Fatmah, nor her husband Shahadut Hossein, had anything to do with the suit.

Ashruf Ali got a decree on the 6th of March 1861 against all the defendants, except Kaneej Fatmah and Shahadut, Luteefun's husband; and in the first instance took out execution against Luteefun's property.

He was met by the daughter Kaneej Fatmah, who objected to the sale, on the ground that the property had been conveyed to her by her mother without consideration, during the pendency of the former suit, on the 14th April 1860, that is:

Kaneej Fatmah's objection was allowed on the 6th November 1862, and Ashruf Ali's heirs proceeded immediately against the remaining judgment-debtor, Kulb Ali, from whom they recovered all that was due.

Kulb Ali, having thus satisfied the decree in full, and having thereby paid more than his quota, sold his right of action to recover the excess payment to the special appellant in this case, who now sues Luteefun personally, and also to have what she calls the collusive sale to Kaneej Fatmah set aside.

These are the facts of the case, and on them the special respondent contends that the suit is one coming under Section 3 of Act XLII. of 1860, and not appealable, as the amount sued for is under 500 rupees. She designates the claim to have the sale to Kaneej Fatmah annulled as a misjoinder, inasmuch as, until special appellant got a decree for the excess quota claimed, she would have no right to contest the summary award of the Moonsiff at all. Special respondent adds that, even were the two claims to be considered as forming one and the same ground of action, the special appellant would be unable to contest the latter, as the time allowed by law for a suit to reverse a summary decision had passed.

With respect to the latter part of this objection, we observe that a suit brought to reverse the Civil Court's order would not have been barred by limitation: for, although the order allowing the sale was dated on the 6th of November 1862, it appears from the records of this Court that the Civil Courts were closed till the 22nd November 1863, and that this suit was brought on the first open day, *viz.*, the 23rd, so that limitation would not apply.

But on the principal question we are of opinion that the special appellant has mixed up two different causes of action; and that, for the purposes of this appeal, we ought only to look to the substantive claim to recover the excess payment from Luteefun personally, and not to a property which was never mortgaged for the debt, nor in any way connected with it.

The special appellant sued to obtain a money-decree, valuing her claim at the amount sought to be recovered, and, until she obtained that, could have no possible right to object to an order releasing Kaneej Fatmah's property from attachment. If, after getting the decree, she had chosen so to object in another suit, with a view to satisfy that decree, by the sale of the property which she believed to be her judgment-debtor's, it would have been a different thing; but when she started this case, she had not only got no decree for the money, but had nowhere shewn that the cancelment of the sale was necessary to her getting the amount of any decree that might be passed in her favor, nor that Luteefun had not other and sufficient funds to satisfy such decree when obtained. It is nowhere pleaded, moreover, that the property released as being Kaneej Fatmah's was Luteefun's share of the estate on which a quota of revenue was due, and there is no reason for supposing that the addition to the plaint was anything more than intentional surplusage, the object of which was, in the

event of the suit being dismissed or only partially decreed, to evade the jurisdiction of Act XLII. of 1860, and to secure an appeal not permitted by law.

The suit was properly a simple one for contribution, and, as such, one that would be decided by a Small Cause Court; and, as the amount claimed was under 500 rupees, no appeal lies.

We, therefore, dismiss this special appeal with costs.

The 25th May 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Execution of decree] (Immoveable property in occupancy of ryot).

Case No. 2488 of 1864.

Special Appeal from a decision passed by the second Principal Sudder Ameen of Hooghly, dated the 27th May 1864, modifying a decision passed by the Moonsiff of that District, dated the 5th August 1863.

Soobhudra Dossee (Plaintiff), *Appellant,*

versus

Gooroo Dyal Singh (Defendant), *Respondent.*

Baboo Otool Chunder Mookerjee for Appellant.

Baboo Mohendro Lall Shome for Respondent.

Procedure to be followed in the execution of a decree for immoveable property in the occupancy of a ryot.

It appears that one Goluck Monee was in possession of certain property as the heir of her husband, and it is alleged by the special appellant, Soobhudra Dossee, that a mokurruree pottah was granted by her to one Gholam Sufdar, who conveyed it to her son; and that, after her son's death, she was in possession of the same. After Goluck Monee's death, Banee Madhub Bhadooree and his two brothers, who were sons of her husband's brothers, succeeded to the property. Banee Madhub, it appears, conveyed the whole property to one Ram Lal, whereupon his two brothers sued for their 10 annas share of the property, making Soobhudra Dossee, the third party, defendant. Plaintiffs obtained a decree against Ram Lal, Soobhudra getting her costs. The plaintiffs then sold their right under the decree to one Gooroo Dyal, who ousted Soobhudra from her ryotee land. She then, under Section 230 of Act VIII. of 1859, petitioned to have an enquiry made as to her dispossession, and the Court dismissed her claim as regards 10 annas of the property, but decreed her claim as to 5 annas of it, and gave her damages in proportion. On appeal the Judge affirmed the Lower Court's decree, with this exception that it rejects her claim to damages, inasmuch as Ram Lal, the owner of the 5 annas of the property, had not claimed them.

Plaintiff now appeals specially, urging that, as she admittedly was a ryot in possession, Section 224, and not 230, was applicable to the matter; that she should have been retained in possession as ryot, and should not, in a suit for title, when, by her being made a defendant, her possession as tenant was admitted, be ousted by an enquiry under Section 230; that consequently the Court, as she was admittedly a defendant, quash the proceedings under Section 230, and direct that she be retained in possession, leaving the parties, who have obtained a decree, to bring any other suit against her that they may be inclined to bring.

We think that, on the facts of this case the enquiry under Section 230 was altogether illegal, and that plaintiff, who was sued as a ryot in possession, should have been retained in possession, and possession to the decree-holders given in the mode suggested in Section 224 of Act VIII. of 1859. Under this view the whole proceedings under Section 230 are quashed. The special appellant, the ryot in possession, will be retained in possession, and the decree-holders obtain possession in the mode laid down in Section 224 of Act VIII. of 1859, and the costs of this special appeal will be borne by special respondent.

The 25th May 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Adopted son (Rights of)—Streedhun—Woman (Sales by)—Succession of one wife's son to property of co-wife.

Case No. 346 of 1864.

Application for review of judgment passed by Justices Loch and Seton-Karr, on the 7th April 1864, in Regular Appeal No. 145 of 1863.

Teencowree Chatterjee (Plaintiff), *Appellant,*

versus

Dinonath Banerjee and others (Defendants), *Respondents.*

Baboo Kishen Kishore Ghose for Appellant.

Mr. R. V. Doyne for Respondents.

An adopted son has all the rights and privileges of a son born, and is also entitled to succeed to the *streedhun* of his mother in the absence of daughters, in like manner as a son born, whether there be or be not a will in his favor.

A woman cannot execute a will regarding any property she inherits from her husband or her father. With regard to *streedhun*, however, she can dispose of it at pleasure either by gift, will, or sale (except immoveable property given to her by her husband).

A son adopted by one wife may succeed to a co-wife's *streedhun*.

THIS appeal was decided in favor of the appellant on 7th April 1864. An application for review was made by the defendants: *first*, as regards the adoption of the plaintiff by Nubo Monjuree, his adoptive mother; and, *secondly*, in regard to the property which formed the subject of litigation, whether Nubo Monjuree had anything beyond an estate for life. On 15th March 1865, it was held that the property became the absolute property of Nubo Monjuree, given to her by her father during her marriage, and as such her *streedhun*. Two other points then arose on which the review was admitted: *1st.* Whether an adopted son can succeed to the property of his adoptive mother. *2nd.* Whether the adoptive mother did make a will in favor of plaintiff her adopted son, and whether she was competent to make such a will.

On the first point, we think there is no doubt that an adopted son has all the rights and privileges of a son born. He is the son of the father and of the mother, and succeeds to the paternal property, and also to the *streedhun* of his adoptive mother in the absence of daughters as a son born would do. In support of his argument, the pleader for the plaintiff quoted the texts noted in the margin,* shewing the *status* of an adopted son, and urged that he had in all respects equal rights with the son born. Against this argument, the learned Counsel quoted the case reported at page 128, Select Reports, Volume III., Gunga Mya, appellant, in which it was ruled that a son adopted by a woman, on whom her father's estate had devolved, would not be entitled to such estate on his adopting mother's death, but such estate would go to her father's heirs. We are not now disposed to differ from or call in question the correctness of that opinion, though in fact it was a mere *obiter* for the question of the *status* of an adopted son was not then before the Court, but it arose from a supposed case put by the second Judge. We think it inapplicable to the present case. The question put to the pundit related to property which had descended to a woman from her father, not as *streedhun*, but in the ordinary course of inheritance; and it may be, as explained to us by Baboo Kishen Kishore, that the reason why the adopted son is excluded from the succession in such cases, is that he is adopted into his adoptive father's family, and not into his mother's family, and cannot perform the *shrad* of his maternal grandfather, though he can perform that of his adoptive mother. But with regard to *streedhun*, which the Court have held the property in dispute in this case to be, the adopted son, in the absence of a will, would succeed to it after the daughters, as a son born; and, such being the case, we think it immaterial whether a will was executed or not in favor of the plaintiff by Nubo Monjuree.

*Sutherland's Dutt: Chand: Synopsis, page 219, or page 153 of the Edition of 1834.
Dya Krama Sangraha, page 57, Section 5.
Dyabhaga, page 82.
Macnaghten's Hindoo Law, Volume I., pages 39-40.

It is scarcely necessary for us to go into the question whether a woman can or cannot execute a will, though it does arise in this case. We think that a woman cannot execute a will regarding any property she inherits in the usual course from her husband or her father, for in this she has but a life-interest; but it is otherwise with *streedhun*, which she is at liberty to dispose of at her pleasure either by gift, or will, or sale, except in the case of immoveable property given to her by her husband.

It has also been asked by the learned Counsel for the respondent, whether a son, adopted by one wife, would be looked upon as the son of a co-wife, and succeed to her property. Though this question does not arise, we may point out that the Hindoo Law of Inheritance provides even for this case, and mentions the son of a contemporary wife among the heirs of a woman entitled to succeed to her *streedhun*.

In the case before us, as the Court has found that the adoption is valid, and that the property in dispute belonged to Nubo Monjuree as *streedhun*, we now hold that plaintiff, as her adopted son, is entitled to succeed to that property in the absence of daughters, whether there be or be not a will in his favor. It is, therefore, unnecessary for us to go into the genuineness of the will, and we affirm the former decision of this Court, and charge the respondent with all costs.

The 26th May 1865.

Present :

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Limit of minority of Hindoos (not being proprietors of Revenue-paying estates)—(Section 26 of Act XL. of 1858).

Case No. 2868 of 1864.

Special Appeal from a decision passed by Baboo Kalee Kinkur Roy Bahadoor, Principal Sudder Ameen of Chittagong, dated the 27th June 1864, reversing a decision of Baboo Poorno Chunder Kostageer, Moonsiff of Jorowabgunge, dated the 6th November 1862.

Monsoor Ali (Plaintiff), *Appellant.*

versus

Ramdyal and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

Discussion as to the limit of minority of Hindoos not being proprietors paying revenue to Government, and as to the proper construction of Section 26 of Act XL. of 1858.

Mr. Justice Phear.—THIS was a suit brought by a son to recover his aliquot portion of his late father's estate from his brothers, who, it was alleged, had kept him out of it ever since the father's death.

It is objected that the suit is barred by limitation ; and the Lower Appellate Court has upheld this objection.

Whether or not the suit is barred admittedly depends upon the determination of the period of life at which the plaintiff may be legally considered to have attained his legal majority. The Lower Appellate Court has decided that the plaintiff's minority ceased at the age of 15 years ; and, in so doing, the plaintiff says it has committed an error of law, against which he, the plaintiff, now specially appeals to the Court.

The plaintiff contends that, by reason of the provisions of Act XL. of 1858, he did not attain majority until the age of 18 ; and, if this be correct, his suit is brought in time.

Section 26 of that Act says: "For the purposes of this Act every person shall be held to be a minor who has not attained the age of 18 years ;" and in the case of Deobo Moyee Dossee *versus* Juggessur Hati, 1 Weekly Reporter, p. 75, a Division Bench of this Court seems to have held that the words "for the purposes of this Act" confine the operation of this Section to cases where the minor's estate is actually taken charge of by, or held under, Government, and that, in all matters unconnected with the possession of estates held under Government, the minority of a male Hindoo terminates with the completion of the fifteenth year. The report does not state what was the subject-matter of that suit, nor does the judgment give any of the reasoning which led the Court to its decision. In the case before us the property in question undoubtedly neither is, nor has been, under the charge of Government, and therefore the judgment just quoted appears to be strictly applicable. If we follow it, we shall be obliged to dismiss this appeal.

But the construction which I understand the Court to have put upon Section 26 of Act XL. of 1858 in Deobo Moyee Dossee *versus* Juggessur Hati does not entirely command my acquiescence ; and I was at first disposed to think that the consequences which flow from it are so important relative to the proprietary *status* of young Hindoo proprietors and their dealings with their land as to render the question deserving of the consideration of a Full Bench.

It seems clear from the words of Section 20 of Act XL. of 1858, taken together with Section 26, that the jurisdiction of the Civil Court over the person and property of the minor continues until the age of 18, whether its intervention be invoked or not. If in-

tervention does not take place before 15, then, on attaining that age, according to the case above referred to, the minor becomes of full age, capable of legally exercising all rights of ownership in such a way as to bind himself and his property, and time commences to run against him in regard to any causes to action which he may possess. But during the succeeding three years, could not a next of kin apply to the Civil Court under Section 3 of the Act, and obtain charge of the statutable minor's property? And, if so, would not the statutable minority date back to the minor's birth, and cover the period during which he was, supposing the case of Deobo Moyee Dossee *versus* Juggessur Hati to be correct, legally dealing with his property *sui juris*? If this period does so become covered by the new minority, how are the minor's acts during that interval to be thereby affected; and will the circumstance that time (if such has been the case) has once commenced to run against the minor in any way alter the time of limitation to be again allowed him after he attains the age of 18?

The difficulties above suggested, as consequent on the decision quoted, seemed to me to throw doubt on its correctness, and to lead to the inference that the Legislature must have intended a somewhat more extended meaning to be given to the words "purposes of this Act," than is attributed to them in Deobo Moyee Dossee *versus* Juggessur Hati. If these words could be considered as equivalent to "relative to all that forms the subject of this Act," then the limit of minority, as regards the exercise of proprietary rights, would be fixed at 18 years of age for all cases whatever, irrespective of whether the Civil Courts has intervened by any direct act or not, and all cause of anomaly would disappear. However, as Mr. Justice Bayley holds the same views as the two Judges who decided Deobo Moyee *versus* Juggessur Hati, I do not think that my own doubts justify me in calling for the determination of the point by a Full Bench. I am, therefore, content to follow the ruling already laid down, and consequently this appeal will be dismissed with costs

Mr. Justice Bayley.—I regret that I cannot concur in the view expressed in this case by Mr. Justice Phear. There is no law which prescribes that the minority of Hindoos (not being proprietors paying revenue to Government) shall extend beyond the completion of the fifteenth year. Section 26 of Act XL. of 1858 is restricted to cases where there is action of the Government through the Collector. Such is not the fact here. There may exist the anomaly suggested by Mr. Justice Phear; but the law itself can, I think, justify only that conclusion which was come to in the case cited in the judgment of Mr. Justice Phear, which, therefore, I would follow. I would, accordingly, dismiss the appeal with costs.

The 26th May 1865.

Present:

The Hon'ble C. B. Trevor, G. Loch, H. V. Bayley, and W. Morgan, *Judges.*

Alluvial Lands.

Case No. 1495 of 1863.

Special Appeal from a decision passed by Mr. A. R. Thompson, Officiating Judge of Nuddea, dated the 4th March 1863, reversing a decision passed by the Moonsiff of that District, dated the 30th April 1862.

Katteemonee Dossee (Plaintiff), *Appellant,*

versus

Ranee Monmohinee Dabee and others (Defendants), *Respondents.*

Baboos Banee Madhub Banerjee and *Nil Madhub Sein* for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

According to Clause 1, Section 4, Regulation XI. of 1825, all gradual accessions from the recess of a river or the sea are an increment to the estate to which they are annexed without regard to the site of the increment. Mere proof of identity of site (without proof of ownership) is not sufficient to defeat the right by accretion which the law gives to an adjacent owner.

By the gradual encroachment of the river Pudha in former years, the village Koopadoha belonging to the plaintiff's zemindary, and a part of the defendant's village of Saldoha, were carried away. In subsequent years the river gradually receded, and the chur, which is the subject of dispute in the present suit, has been formed. The chur occupies, we understand the Judge to find, the site of the lands formerly washed away. It has been formed by gradual accession to the defendant's village from the recess of the river; and it appears, therefore, to be an increment within the express provision of Clause 1, Section 4 of Regulation XI. of 1825, and to belong wholly to the defendant. The defendant's right is undisputed to the portion of the newly formed land which occupies

the place where the old lands of his village of Saldoha stood; it is admittedly an increment to his old estate. But the new land, beyond those limits, is claimed by the plaintiff as his property, because it stands where his village of Koopadoha formerly stood. It is not denied that this land is an alluvial formation like the portion already mentioned; but, although like that, it has been formed by gradual accession, it is, according to the plaintiff's argument, not land "*gained* by gradual accession" within the meaning of the clause referred to, but a re-formation on the old recognized site of his village, and therefore his property. The Judge has found that Koopadoha was entirely washed away upwards of twenty-five years ago, and that not a vestige of the village remains. Any recognition of the land is now impossible, and it is only *upon the identity of site* that the plaintiff's claim is based. The Division Court has referred the case to a Full Bench in consequence of a decision reported in I. Marshall 136 (Romanath Thakoor and others *versus* Chunder Narain Chowdhry and others), which has been understood to sanction the construction of the law for which the plaintiff contends. It is said to have been there held that Clause 1 of Section 4 applies only to cases of land *gained*, that is to say, formed upon a site which cannot be recognized as that of the estate of any former proprietor; and that where the accretion can be clearly recognized as having been re-formed on that which formerly belonged to a known proprietor, it remains the property of the original owner.

Regulation XI. of 1825 is a declaratory law, whereby the previously well-established rules and customs for the determination of claims to land gained by alluvion, or by dereliction of a river or the sea, were formally enacted as written law. It contains a recital that, "in consequence of the frequent changes which take place in the channel of the principal rivers that intersect the Provinces immediately subject to the Presidency of Fort William, and the shifting of the sands which lie in the beds of those rivers, *churs* or small islands are often thrown off by alluvion in the midst of the stream or near one of the banks, and large portions of land are carried away by an encroachment of the river on one side, whilst accessions of land are at the same time or in subsequent years gained by dereliction of the water on the opposite side." The Regulation then declares (Section 2) that certain disputes relative to alluvial lands between proprietors of contiguous estates divided by a river shall be decided by immemorial and definite local usage. Where no such local usage exists (Section 3), the rules declared by the subsequent Sections are applicable. The first of these (Clause 1, Section 4) is the rule in question relating to land gained by gradual accession.

Accession is an increase or addition to something previously belonging to us. The proprietor of the land becomes also, by virtue solely of his old proprietorship, the owner of the alluvial soil gradually added by the river to his land. The imperceptible increase of his property in no way affects his ownership of every portion of it. That which has been recently added is his, because he is the proprietor of the older portion. In every title founded on accretion, it is essential that the ownership of the adjacent lands should be established by the claimant.

This first clause of the Section provides that, "when land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed."

We read this clause to declare that what is added by gradual accession must *in all cases* be considered an increment to the old estate without regard to the site of the increment. Whether the new land is a re-formation on an old site, or whether it is formed where no land ever previously existed, its ownership is determined, when the ownership of the adjacent land to which it has by imperceptible degrees accreted is ascertained. If, therefore, in the present case the ownership of the adjacent land has been duly ascertained to be in the defendant, and the newly formed land is found to have been gradually gained from the river by accession to the defendant's adjacent land, we think that the plaintiff cannot lay claim to any portion of the latter by showing that it occupies the site of his village of Koopadoha, and that it is needless to remand the case for a more distinct finding as to the identity of site.

The language of the Court in the judgment which has been quoted appears to limit the operation of this clause, so as to exclude from its provisions land formed again by accretion on an old site which can be clearly recognized. If we are to understand the Court to have held that

"land formed on the site of an old estate belongs to the person who was the owner of the old estate, and not to the owner of the adjacent dry land, to which it has by slow degrees accreted, we must dissent from this opinion." The law recognizes no right of property in a mere site, nor any such mode of acquisition as that which would confer on the proprietor of an old estate (every particle of which may have long ago disappeared or passed away) the ownership of land since formed on that site, however clearly the identity of *the site* may be established. It is only where the original owner retains his property in land on *his old site* that he can lay claim to the surface where it re-appears above the water; and his title to this is not necessarily by accretion (because he will be equally the owner, whether the land is exposed by a sudden recess of the river, or by a gradual deposit of soil on its surface), but by virtue of his old ownership remaining undisturbed. The judgment in the case quoted, when it speaks of "the "recognition of a site," may perhaps be understood to refer to the case of a still continuing ownership in land which has disappeared by submergence beneath the surface of the water. This is probable from the following passage in the judgment: "It "never could have been intended that, when "the surface of an estate is washed away, "and the lower portion of it is covered with "water and formed into a portion of the bed "of a river, the ownership of that portion "of the estate which has become inaccessible "in consequence of its being covered with "water should be lost; and that, when the "surface is re-formed, it should become the "property of an entirely different owner, "because he may happen to be the owner "of the estate adjoining." The suit itself was one instituted to recover land claimed by the plaintiff as gained by accretion to his estate. The plaintiff seems also to have claimed the land as a re-formation on the site of lands formerly belonging to him, but which had since been washed away. The judgment only, and not the argument of the pleaders, has been reported. We are, however, able to state (Mr. Justice Bayley having been a Member of the Court) that the argument for the defendant (against the plaintiff's right to the land as re-formed on the site of his old land) was carried to the length of contending that *in no possible case* (not even where the existence of a mine or some clear means of recognition enabled the identity to be established beyond dispute) could the old rights of property in land, the surface of which was wholly washed away, subsist so as to be the foundation of a title to newly formed land. The judgment should perhaps be read with reference to the argument, which is clearly untenable. The ownership of land is not ordinarily lost, because the land itself may be submerged or inundated. The case of Musst. Imam Bandi *versus* Hurgovind Ghose (4 Moore's Indian Appeals, p. 403) is a striking illustration of this. The land there in dispute is thus described in the judgment: "The whole of the district adjoining the land in dispute, as well as that land itself, is flat, and is very liable to be covered or washed away by the waters of the *Ganges*, which river frequently changes its channel. The land in dispute was inundated about the year 1787: it remained covered with water till about 1801; it then became partially dry, till in the year 1814 it was again inundated. After this period it once again re-appeared above the surface of the water, and by the year 1820 had become very valuable land." These frequent changes and the lapse of time were deemed not to affect the question of title, for the judgment continues: "The question then is, to whom did this land belong before the inundation? Whoever was the owner then remained the owner while it was covered with water and after it became dry."

So in the case supposed, in the passage of the judgment under consideration which we have quoted, the surface stratum may be swept away, and lost without disturbing the old ownership in the land or mines beneath (subject perhaps to some limitation or qualification when what is left forms the bed of a navigable river). Where the remaining land can be sufficiently identified, no change takes place in its proprietorship, and whatever becomes annexed to it belongs to the old owner if he is known.

But this principle cannot, we conceive, govern the case which has been referred to us. The old right of property cannot remain in existence after the lapse of any length of time, however considerable, nor unless something beyond mere identity of site is brought forward in proof of it. To defeat or prevent the right by accretion which the law gives to the adjacent owner, the claimant is required to prove some continuing right of property to himself; it is not enough for him to rely merely on identity of site. If he can show no assertion of ownership, such as

the condition of the property admits of, for a great number of years, it may fairly be concluded that he has relinquished all right and claim to the remnant of what once belonged to him. In this case upwards of a quarter of a century has passed since the plaintiff's village was washed away, and there is no suggestion of any evidence in support of the continued existence of any portion of his old estate, beyond the (alleged) identity of site, or of any right of the plaintiff therein.

With this expression of our opinion of the law as applicable to cases, like that before us, we remit the case to the Divisional Bench.

The 26th May 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Sale of (Government property)—Non-deposit of earnest-money—Power of Attorney—Agent (powers of).

Case No. 309 of 1864.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 26th May 1864.

The Collector of Dacca (Plaintiff), *Appellant,*

versus

Nund Lall Roy and others (Defendants), *Respondents.*

Baboo Kishen Kishore Ghose for Appellant.

Baboos Kalee Mohun Doss, Nuleet Chunder Sein, and *Sreenath Banerjee* for Respondents.

Suit laid at rupees 13,550.

Suit for damages sustained on a re-sale of a Government estate. The original sale was made under certain conditions laid down by the Board of Revenue which merely provided for the payment of the purchase-money, and (on failure thereof) for re-sale at the risk of the defaulting purchaser; but not for the rejection of a bid if a deposit of earnest-money were not made, and for the continuance of the sale irrespective of it. HELD that the non-deposit of the earnest-money did not affect the validity of the sale.

A power of attorney authorizing an agent to bid for a particular estate on a particular date does not limit him as to time of purchase. The power not being limited to a particular date is good whether the sale be held on one date or another.

THE Collector of Dacca sues the defendant for damages sustained on a re-sale of a talook which defendant had purchased, but failed to pay for.

The plaintiff alleges that a notification was issued for the sale of the zemindary rights of Government in an 8-annas share of Jowl Batwal Tarakandee, which was a khas mehal, bearing a sudder jumma of rupees 708-0-8; that the notification contained a condition to the effect that, in the event of default in the deposit of the purchase-money, a re-sale would be made at the risk of the auction-purchaser; that on the 8th September 1863, the four first defendants purchased the property in question through their mooktear, the defendant Shib Narain Ghose, for a consideration of 20,100 rupees; that as they failed to pay in the purchase-money agreeably to the conditions of sale, a re-sale was made on the 23rd November of the same year for 6,550 rupees; that, by defendants' failure to pay for the mehal that they had purchased, the re-sale became necessary, and Government has thereby sustained a loss of 13,550 rupees, the difference between the price at the two sales, and under the condition of the sale notification, which was published in the *Gazette* of the 11th August 1863, defendants were justly liable for that amount. Hence the present action.

The defendants, Joogul Kishore Roy, Bungshee Budun Roy, and Ramanath Roy, pleaded that they neither bid for nor purchased the Government estate Jowl Batwal Tarakandee; that when the sale of the khas mehal had been fixed by the Board of Revenue for the 13th Srabun 1270, they, in conjunction with Huro Lal Roy and Than Singh, defendants, executed a power of attorney in favor of the defendant Shib Narain Ghose, empowering him to bid in that sale; that as the sale did not take place *on the day fixed,* the power of attorney became null and void; that after a second notification had been issued, fixing another date of sale, no new power was given to the agent; that by the mooktearnamah given, no general power had been given to the agent to purchase for them without reference to time; hence they cannot be liable for an unauthorized act of the defendant, Shib Narain Ghose, though he may be responsible to Government; that, moreover, the power was a joint one on the part of five persons; hence the agent could not bid for the others, omitting the name of one; and, if he did so, he is liable, and not the parties whose instructions he has disobeyed; that as no earnest-money had been paid by them, the purchas-

ers, the sale was not complete; and, having only bid at an auction-sale, they cannot be responsible for damages, which can only, in a case like the present, under the notification of sale and the general Sale Regulations, be thrown on a purchaser who has, after depositing the earnest-money, failed to fulfil his first purchase, in which case, doubtless, the property is to be sold at the risk of the first purchaser; that the sale notification, moreover, did contain no condition affecting with liability a bidder who might fail to deposit the earnest-money. Hence the present suit, which is contrary to those conditions, and in itself not warranted by law, should be dismissed.

The defendant, Huro Lal Roy, pleads pretty much to the same effect with the above defendants. He adds that the agent Shib Narain Ghose acted in opposition to his instructions in bidding such a large sum as 20,100 rupees, he having been restricted to 3 or 4,000 rupees.

The agent, Shib Narain Ghose, pleads that he was empowered by the defendants to bid for them at the sale of the mehal, and did so in good faith; that consequently the action will lie against his disclosed principal, and not against himself; that, though in the power of attorney it was recited that 7½ annas of the talook should be purchased in the name of Huro Lal, and 7½ annas in those of Joogul Kishore Roy, Bungshee Budun Roy, and Romanath Roy, and a one-anna share for Than Singh, still, previous to the sale, the latter expressed his inability to pay for his share, and it was arranged amongst them that Huro Lal should purchase 8 annas, and the other three grantors of the mookteamamah, the remaining 8 annas; that for this reason Than Singh was not entered in the sale register; that Huro Lal Roy and Joogul Kishore Roy were present at the time of the sale, and instructed him to make the highest bid, and secure the property. Hence it is clear that they, and not he, are liable in the present action.

The Principal Sudder Ameen has decided the case on simply one ground. He is of opinion from the conditions of the sale that the payment of the earnest-money was necessary to make the contract complete; that the defendant admittedly did not deposit the earnest-money, and there being no contract, the present action for damages, founded on a breach of a contract, and on injury resulting from that breach, cannot be maintained. Moreover, the defendants, for their failure to deposit the earnest-money, might have been sued for damages, but Government, by re-selling the property, has waived any right which it may have had to bring such an action. He consequently dismissed the plaintiff's claim without enquiry into any other point and with costs.

From this judgment an appeal has now been preferred to this Court. It is contended on the part of Government that the contract of the purchase and sale is complete when the bid having been made has been accepted by the seller; that the payment of earnest-money is only demanded for the security of Government; that Government may, under the condition subject to which this sale was made, forego its claim to the deposit of earnest-money, allowing to the purchaser a period of 15 days for the payment of the entire sum bid, as it has done in the present case; and that the failure at the end of the period to pay up the purchase-money renders the purchaser liable under those conditions to an action for damages like the present; that consequently the decision of the Lower Court should be reversed.

The sale of the property of Government, out of which the present suit has arisen, was made under certain conditions laid down by the Board of Revenue, and not under the conditions of any public Sale Law. In determining, therefore, the validity of the sale, we must have recourse in the first instance to those conditions. The fourth condition upon which the question before us turns is to the following effect: "If the "amount of purchase-money exceeds rupees "100, one-fourth of the amount bid is to "be immediately deposited. If the balance "be not paid by noon of the fifteenth day "after the sale, reckoning the day of sale as "one, or if the day be a close holiday, then "by noon of the first succeeding office day "the sale is to be cancelled, the sum deposited being forfeited to Government, and "the mehal to be again put up for sale at "the risk of the defaulting purchaser."

Now, there can be no question that irrespective of particular Statutes when the terms of sale have been agreed on, and the bargain struck, and everything the seller has to do with the property is complete, the contract of sale is absolute, as between the parties without actual payment or delivery, and, in the case of land, the property then vests in the buyer, who, though he acquired the right of ownership, is not entitled to enter on possession until the price be paid. It

is true that in certain public Sale Laws* a bid is never finally accepted until the deposit of a portion of the purchase-money has been paid; and in case the deposit is not made, the bid is rejected, the sale proceeds, and the bid next in amount to the one rejected is considered the highest, and if no one bids beyond that, the property is knocked down to that person who becomes the purchaser. But these conditions are prescribed by laws, and affect none but sales made under those laws, which the present is not. The question, then, for us to determine is simply this: has the fourth condition above cited imported into this sale the condition of the public Sale Law, which is the essence of defendant's case, and made the tender of earnest-money a condition precedent to the final acceptance of the bid? Looking to the wording of the condition, we think there is no ground for the contention raised by the defendant, respondent; but it simply requires that one-fourth of the purchase-money shall, if the price exceed 100 rupees, be immediately deposited, and the remainder by noon of the fifteenth day after the sale, failing which the estate shall be again put up for sale at the risk of the defaulting purchaser. Here there is no provision regarding the rejection of the bid should the deposit not be made, and the continuance of the sale irrespective of it; it is merely a condition for the payment of the purchase-money. One-fourth is to be paid immediately, and the balance fifteen days after; and the mehal is to be re-sold at the risk of the purchaser, if it be not paid within that time. The terms are merely, in short, made for the security of Government, who can act with them either with greater or less strictness, who may forego the payment of the one-fourth, if it pleases, and accept the payment of the whole purchase-money on the fifteenth day from the sale.

* XII. of 1841. I. of 1845. XI. of 1859.

Looking at the transaction in this light, we are clearly of opinion that the purchase by the defendant was complete; that he failed to act up to the conditions of the sale, and has justly rendered himself liable to the difference between his bid and that sum which was eventually realized.

Here the appellant's case ends. But the defendants, taking advantage of Section 348 of Act VIII. of 1859, have urged that, admitting their liability under the condition of the sale, the agent, who bid in their names, was not empowered by them to act; that they simply empowered him to bid at a sale of the property which was fixed to take place on the 13th Srabun 1270; that this sale took place on another date; and that consequently being beyond the authority of the agent, his purchase must be considered to have been made on his own account, and not on theirs, and he alone must be made liable.

We have perused the power of attorney granted by the defendant to the agent Shib Narain Ghose, and see not the slightest ground for the present contention. It empowers him to bid for the particular estate to be put up on a particular day, but limits him in no way as to time of purchase; and it may fairly be inferred from it that the intention of the parties executing the deed, in mentioning the date, was only to designate the day on which the sale was fixed to take place by authority, and not to limit him to the time or date on which the purchase was to be made. The postponement of the sale was accidental, and the power to purchase not being limited to a particular date was good whether the sale were held on one date or on another. We consider, therefore, that the agent had sufficient authority from the defendant to bid, and that the Collector, in accepting that authority, construed it correctly.

As to the plea raised by the different defendants as to the conduct of the agent, to the effect that he had purchased the property in the names only of three and not of four persons, and has bid beyond what he was empowered verbally to do, these are points arising out of his conduct which may be raised in suits between the principals and their agents; but as we have found the agent legally empowered to purchase the property for the defendants, even if they were well founded, they could in no way affect the validity of the purchase from Government by the agent. We will only remark that, as far as the defendant Shib Narain's conduct has been before us in this case, it seems to us to be marked by the strictest good faith.

Under this view of the whole case, we reverse the judgment of the Court below as against all the defendants, except Shib Narain Ghose, and decree to the plaintiff the sum of 13,550 rupees with interest at 12 per cent. from the date of suit to the date of realization, with costs of all Courts payable by defendants, respondents. The defendant Shib Narain is released from the suit, and will obtain his costs from the defendants.

The 26th May 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Guardians (Liability of, appointed by Civil Courts)—Debts barred by Limitation—Production of false Documents.

Case No. 436 of 1864.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 14th September 1864.

Chowdhry Chuttarsal Singh (Defendant), *Appellant,*

versus

The Government (Plaintiff), *Respondent.*

Baboos Dwarkanath Mitter, Onoocool Chunder Mookerjee, and *Mohesh Chunder Chowdhry* for Appellant.

Baboo Kishen Kishore Ghose for Respondent.

Suit laid at rupees 12,532-7 annas.

Guardians appointed by Civil Courts ought to file the accounts of their estates annually as required by law.

A guardian is not necessarily accountable for sums paid by him in discharge of debts barred by limitation.

The production of a false deed in support of payments does not of itself justify a decree against him for the sums covered by the deed, if the payments be proved by other evidence.

The appellant succeeded his father Purtab Narain Singh as guardian of Kessuree Sohaye, the infant grandson and heir of Chowdhry Dyal Narain Singh, the deceased brother of Purtab Narain. Complaints being made to the Judge of the district by Sheo Surun, the maternal uncle of the infant, the appellant gave up the management of the estate, and the Judge, finding himself nothing to blame in the mode in which the guardianship had been discharged, directed the minor's uncle to sue in the Civil Court, to establish the alleged misconduct of the guardian, and the loss caused thereby to the minor's estate. The estate of the minor was then taken under the Court of Wards, and Sheo Surun was appointed the surburakar. An action was brought nominally by the Court of Wards, but at the instigation and under the management of the said surburakar against the appellant for the recovery of rupees 40,532, consisting partly of sums alleged to have been lost by the negligence of, and partly of money charged to have been misappropriated by, Purtab Narain and the defendants, while acting as managers to the estate of the minor from the year 1266 to 1269 F. The Principal Sudder Ameen gave a decree for five items, amounting to rupees 12,572-7-5, and disallowed the remainder.

Against this decision the appellant has appealed. The plaintiff has preferred no cross-appeal for the portion of the claim dismissed by the Court below.

The first item decreed is rupees 1,125, the price of the crops of the mehal Kadera for the year 1257 Fuslee. This item has been twice taken into account by the Principal Sudder Ameen. He decreed it first as a sum not credited, and again as a portion of the item No. 5, where among other items the alleged payment to Sheo Surun, including this sum of 1,125 rupees, is disallowed. The price of all the crops for different years of different villages, which came into the hands of the guardians, is duly entered in their accounts; and the attempt of Sheo Surun to prove this sum to be the value of the crops for the year 1266, and that which the defendant describes as the value of the latter year to be that of the year preceding, has failed. The claim for this item is based in the plaint on the ground that while an allusion is made to it in an entry of a payment of 2,000 rupees to Sheo Surun (to the effect that the said 2,000 rupees were paid in addition to the price of the crops sold in the Mofussil for 1,125 rupees) no credit is allowed for the latter sum in the accounts. Now, the defendant alleges that he paid this money to Sheo Surun with the said 2,000 rupees, and, if he succeed in establishing this payment to Sheo Surun, for which, in order to avoid the necessity of entering this on the credit side, the defendant charges the estate only to the extent of 2,000 rupees, the defendant is clearly absolved from all liability for this sum. If he fail to establish the payment, the item should be charged against him only once, and not twice under two different heads. The fact of the money not being credited in the defendant's accounts, and the fact of the receipt for this payment being dated subsequent to the date of the entry in the accounts of the defendant, is explained by shewing that, at the time of the recording of this entry, the disputed sum was not paid, but was ordered to be paid from the Mofussil; it, therefore, was not entered formally in the accounts kept of the estate by the guardian. It is, however, mentioned in the village accounts of Kadera in which the money is entered as sent on the third of Kartick to

Sheo Surun at Senha, the village where he resided, and the receipts for this payment and the 2,000 rupees are dated the 11th Kartick. The decree for this item is, therefore, disallowed.

The second item decreed is a sum of rupees 111-15, being the difference between the sum in deposit as the surplus proceeds of a property of the minor sold (perhaps before the management of Purtab Narain) for arrears of revenue, and the sum credited by the defendant as received on that account, *minus* the 25 rupees allowed to the defendant by the Principal Sudder Ameen. The fact that the defendant had described the property sold as the property of Deb Narain Singh, a near relative of the minor, held in benamee for the relative through whom the surplus was drawn from the Collectorate, and the fact that this person denied on oath that he ever had occasion to make a fraudulent benamee of his property, are not material to the present case, as, notwithstanding that allegation, the surplus proceeds of the property are actually credited in the minor's accounts. There is proof that no more than what is credited was brought to the guardian, and the expenses said to have been incurred when drawing the money and deposed to by the witnesses for the defence, but disallowed by the Lower Court, are such as are likely to be incurred. A part of the money decreed under this head is admitted by the party drawing the money to have been paid over to certain Law-agents for previous service, and a part, he says (though the defendant had not said so), was paid to him. We think these expenses should not be retrenched. Some of the expenses likely to be incurred on such an occasion are such as are alleged to have been incurred. There is nothing in the evidence to warrant a decree for this sum against the defendant. The statements of near relatives of the minor, respectable persons, such as the defendant's father and the defendant himself, cannot for such charges be fairly disbelieved, without a reasonable ground for suspicion. The plaintiff does not pretend to prove, in contradiction to the evidence of the defendants, that more than the sum credited was received by the defendant. When the defendant actually received the sum he has credited, and *bonâ fide* spent the trifling sum which is the difference in expenses for drawing this money, we find no ground for a decree against the defendant. We disallow this item also.

The third item is a sum of rupees 1,805-4 being the difference between the sum admitted by the defendant to have bee received by the defendant from Hurruch an ijmallee ryot, and the sums charge to have been realized, including the ba lance of the decrees, not yet realized There is no proof that more than th defendant says was received by him wa ever realized. For the half share of th portion of the sums decreed, which is sti unexecuted, the defendant should not b obliged to pay to the plaintiff the amou from his pocket. The fact of the decree being in the name of the defendant is no alone sufficient. The plaintiff may caus the decrees to be executed for his half shar to the extent not realized. The only proo which the plaintiff has given in support o his claim under this item is this, that in th petitions of compromise of some of the case it is stated that the whole sum demande was paid by the ryot. The defendant however, proves that in these cases the compromise was actually made for a smalle sum. The facts connected with these compromises and decrees have been deposed t by several witnesses for the defendant, an all the facts connected with these litigation as apparent from the amounts decreed b the Court of first instance, and the abandonment of certain counter-claims by the ryot clearly satisfy us that the full amount of th demand could not have been paid by the ryo in the cases settled by a compromise. Th cause of the insertion of the expression i some of these petitions of compromise, to th effect that the whole of the amount claime was paid, is satisfactorily explained. It i said that, with reference to the nature o these cases, which were for enhancement it was apprehended that, if the fact o any deductions being allowed were open recorded, it might tell against the righ of the minor and the defendants with th other ryots. Be that as it may, it is clea we have no evidence from the plaintiff t show that the evidence and the statement of the defendant with regard to the amount fo which compromises were made is anywis open to objection or suspicion. Merel upon the wording of the petitions of com promise, it is not fair to give a decree agains the defendant. We, therefore, disallow thi item also.

The fourth item decreed is a sum o rupees 503-8-10, said to be arrears from th Mofussil tehsildars. These are balance yearly remaining due from these mofussi

agents, and from the sums thus due for one year, collections have been made in subsequent years. Most of these tehsildars are still in the service of the plaintiff, and, even if they were not, the sums remaining in arrears are a very trifling portion as compared with the yearly collections, and further there is no proof of any negligence of the defendant in not realizing. Of this sum more than 450 rupees due from three persons is the balance of 1268, and the remainder the balance of 1266 and 1267 due from a fourth tehsildar. If the defendant and his father had annually filed the accounts of the estate as required by the law, the Principal Sudder Ameen would not have felt himself warranted to express strong terms with regard to this item, and others decreed by him, that the accounts filed by the defendant are forgeries. It would seem that the law on this point has been almost invariably neglected by all guardians appointed by the Civil Courts throughout the country.

The fifth item was a decree for miscellaneous sums, altogether amounting to 9,026 rupees 6¾ annas. This may be divided into two parts—the *first* is an item composed of 3,441 rupees alleged to have been paid in liquidation of debts to Sheo Surun and his co-sharers, and to some other creditors of the estate of the minor. The other portion is composed of retrenchments to the extent of 5,584 rupees of more than a thousand items from the expenses of the four years, during which the father of the defendant and the defendant himself managed the estate of the minor. The first portion may be again sub-divided into two heads—*first*, the debts paid to Sheo Surun, and the debts due to others. The sum paid to Sheo Surun amounts to 3,125 rupees, and the rest was paid to the other creditors holding letters of assignment from the minor's grandfather.

With regard to the latter item, the objection upon which it has been disallowed to the defendant is that these debts, being barred by the Law of Limitation, should not have been paid by the executor. All these payments are by deductions from the rents due from the creditors. Now, it is matter of doubt whether these claims had been extinguished so as to be barred in Courts of Justice. The debt to the carpenter, of which so much is made by the Lower Court, was a very small sum, and the genuineness of it has been deposed to by the creditor. We have no reason to suspect that the defendant, for the sake of a portion of 97 rupees, conspired with the carpenter to defraud the estate of the minor, or caused him to depose falsely in a Court of Justice. Even assuming that the claims under assignments were liable to be affected by limitation, still in the absence of any proof that the debts alleged to have been discharged were fictitious debts, and in the face of the proof that they have actually been paid, it is not a ground for retrenchment that the guardian thought proper to pay the debts honestly.

As to the debts paid to Sheo Surun, it appears they are covered by three documents—a farkhuttee, dated 11th Kartick 1268, for rupees 2,658-15; a letter of the same date for rupees 466-1, making up a total of 3,125 rupees; and a letter, dated Magh 1268, for 316 rupees. All these three documents are produced and attempted to be proved by the defendant. Sheo Surun and his relatives, who had an interest in the conditional mortgage of a property belonging to the estate of the minor, deny the first and the third, and Sheo Surun admits the second. The third is disallowed by the Principal Sudder Ameen; it is not written on a stamped paper. It, however, being a letter acknowledging the receipt of money was not necessarily required to be on stamp, and the money for which it was given is not openly claimed by Sheo Surun as still due to him. The second deed is described in the answer to have been regarding the payment of an amount of interest. But the document itself appears to be a receipt for certain debts with interest; and for this disagreement between the writing and the statement in the answer, the Principal Sudder Ameen appears to have disallowed the sum covered by this document. Now, whatever may be the money for which the payment was made, it is clear that the defendant having paid the money, and debited it in his accounts of the estate, he is entitled to be relieved from responsibility for this sum collected and disbursed by him. Nor does it signify by what name this payment was for one cause or another described in the answer. As to the third document, the Judge below appears from one portion of his judgment to have believed to some extent that the money was paid, but that the deed given on the occasion was lost, and a false one substituted for it. He appears from another portion of his judgment also to say that he is not satisfied with the genuineness of this document, and he disbelieves the assertions of the defendant regarding

the payment of the sums covered by the deed. The production of a false deed cannot be considered as a good ground for decreeing the sum covered by the deed, if the payment of the money be established by other evidence to the satisfaction of the Court trying the case. We are not satisfied, on the evidence in the case, that the Principal Sudder Ameen is justified in disbelieving the document produced by the defendant. For the reasons assigned by him for believing the deed to be a forgery, satisfactory explanations have been suggested before us by the defendant; and we do not see any good ground for discrediting the direct evidence produced in support of its genuineness. The village Simlah, where the deed was written, though lying within the jurisdiction of the district of Shahabad, is separated from the district of Ghazeepore merely by the Ganges; and there is nothing improbable in this, that when a large sum of money was paid and a receipt taken, and the law required receipts to be stamped, that the stamp was found available, though procured beforehand from across the river. The witnesses having explained this on being asked, there is no ground for the Principal Sudder Ameen to make such remarks as appear in lines 25 to 28 of page 32 of the printed case. But, assuming that the defendant has failed to prove the genuineness of this paper, we cannot understand how the Principal Sudder Ameen has passed over the strong proofs of this payment, which the record of the case and the conduct of Sheo Surun so clearly supply. Of the two deeds decreed by the Principal Sudder Ameen, the one for the larger sum of 2,651 rupees is the farkhuttee. Now, the farkhuttee is said to have been given for the interest of the debt secured by the conditional mortgage due subsequent to the period for which a suit was brought by Sheo Surun against the estate of the minor, and was decided by an arbitrator, Moulvee Reozut Hossein, the pleader of the plaintiff in the present case. It has been proved by the testimony of this witness taken in this case (the report of which deposition is wrongly recited by the Principal Sudder Ameen) that Sheo Surun had before him admitted the execution of a farkhuttee relating to the interest of the mortgage debt subsequent to the period for which the witness had occasion to arbitrate. Sheo Surun now says that the farkhuttee, which he had admitted before the arbitrator, was one executed by him for another debt due from the estate of the minor, but cannot show any proof or details regarding this debt. If the deed was given by him for the same amount which the defendant says was given for the interest of the mortgage debt, as no other payment to Sheo Surun is debited in the accounts, this attempt of Sheo Surun to explain away the farkhuttee is quite sufficient to debar any retrenchment for this item. We are, however, satisfied that the farkhuttee, which Sheo Surun spoke of before the arbitrator, was one given for the interest of the mortgage debt for the period stated by the defendant, *viz.*, for the years subsequent to the period for which the arbitrator had occasion to adjudicate.

As to retrenchments of the miscellaneous items, we do not find any ground to justify the decree passed by the Lower Court. They are chiefly composed of necessary expenses, unavoidable even though the minor was in debt, and do not appear to us to be objectionable. The *poojah* and the charity expenses, and the payments to the son-in-law of the defendant on two occasions of trifling sums altogether amounting to less than 200 rupees, and the payments of *khorakee* (subsistence-allowance) to servants deputed for business to places distant from the family residence, and the various sums of money spent for supplying eatables and clothes to the infant, have not been shewn to be expenses beyond what the social position of the infant's family required, or which his income did not justify. Almost all the servants, who are said not to have been in the service of the minor, the payment of whose wages to the extent of rupees 622-12-6 has, on this groundless assertion, been disallowed, have deposed in favor of the defendant, and the plaintiff has produced no evidence to contradict this proof. The two guardians were the brothers of the grandfather of the infant and his son, *viz.*, the uncle of the minor. Both acted gratuitously, and there is every reason to believe that both of them considered it their duty to watch over the interests of the minor with care and zeal. They may well be supposed to know the necessities of their ward; and, when it is not denied that most of these items retrenched are sums actually spent *bonâ fide* (and it appears to us with a due regard to the minor's position), the defendants should not have been made liable because, in the Principal Sudder Ameen's judgment, it might have been possible to carry on the management of the estate of the minor, and to support him without incurring these expenses.

It has not been attempted to be shown what the state of the minor's estate under its present management, and whether the amount spent for any particular charge by the guardians exceeded, and by how much, the similar charge incurred at present, and whether the costs to the estate are now less, or the collections are higher, than during the management of the defendant.

The personal expenses of the guardian disallowed by the Court are travelling expenses which he had incurred when he had occasion to transact some joint business, half which expenses was charged to the estate. Of the 72 rupees 9 annas so spent in the course of four years by the guardians, the plaintiff claimed a retrenchment of 51 rupees, and the decree is for 25 rupees only. The expenses on account of charity, which are complained of, amounted in the four years to 49 rupees, of which 168 rupees are retrenched. The Principal Sudder Ameen has allowed a retrenchment of 10 rupees 9 annas spent by the guardian in maintaining a garden which was, perhaps, considered as a luxury not to be allowed to the minor. He has also, out of an expenditure of 72 rupees 2 annas for stationery, retrenched rupees 1-8. Notwithstanding the statement to the contrary made by the Principal Sudder Ameen, we find that the details of all the expenses are given by the guardian, except that of certain petty expenditure in copper, to the amount of 102 rupees. One of the retrenchments decreed is an item of 300 rupees as the collection of the village Meera for the year 1266. It appears from the evidence of Raj Kalee Koonwur, the widow of a childless son of Dyal Narain, who died before his father, that this village was formerly, and during the time of the guardianship of the defendant's father and defendant, made over to the said Raj Kalee for her maintenance. There is no demand for the collections of this village from the defendant for the years subsequent to 1266. The defendant's father in the accounts of his first year's management mentioned that so much was collected by the amlahs and spent. The present demand was made by the plaintiff on the ground of this recital in the accounts. There being no occasion to enter the details of this account, no detail was given, and we think no decree should be given to the plaintiff for this sum. It is for this assignment of the collections of this village that the plaintiff objected to, and the Principal Sudder Ameen allowed, a retrenchment of the 3 rupees on account of a *doputtah* purchased for Raj Kalee Koonwur. We disallow the whole of this item No. 5.

The result is, that we decree the appeal, and dismiss the suit.

We regret to observe that a considerable length of time, nearly a month, was occupied by the Principal Sudder Ameen in trying this case. Had he, as we are informed, as asked by the appellant, referred the case to a Commissioner to take the accounts, he would have saved much time, which might have been more usefully devoted to his judicial duties.

Our order is that this appeal be decreed, and the suit dismissed with costs. The costs of the portion of the claim disallowed were charged rightly by the Principal Sudder Ameen against Sheo Sarun, on the ground that this portion of the claim was improperly made by him. His estate should bear the whole costs of suit up to the time of appeal. The costs of this appeal will be paid by the estate of the minor.

The 27th May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Partition—Right of Member of Hindoo Family to Claim.

Case No. 3181 of 1864.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 8th September 1864, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 26th January 1864.

Sreenath Dutt (Plaintiff), *Appellant,*

versus

Nund Kishore Bose and others (Defendants), *Respondents.*

Baboos Onoocool Chunder Mookerjee and *Banee Madhub Banerjee* for Appellant.

Baboos Prem Chand Paul, Tara Prosunno Mookerjee, and *Prosunno Coomar Sein* for Respondents.

A member of a Hindoo family is not barred from his right of requiring a partition of the family property unless his conduct has

led the other members of the family into a reasonable and well grounded supposition that there has been a separation on his part, and an acceptance of a defined portion of the property instead of his family share.

In this case the plaintiff sued defendant for having wrongfully built up a wall and obstructed the lights of his (the plaintiff's) house, and thrown the waters of the rains against his wall, and thereby damaged it. And the plaintiff also sued for a partition of certain homestead land.

The Lower Appellate Court dismissed the plaintiff's suit on the ground that he had not denied that the land on which the defendant built his wall belonged to the defendant; and further that the plaintiff might himself have prevented the nuisance of the water; and that he had by laches and acquiescence lost his right to a partition.

It is objected, on special appeal to this Court, that the Judge has erred in saying that the plaintiff did not in his plaint deny the defendant's right to build his wall on the ground where he placed it; and, after hearing the whole plaint read, we think the objection valid. We also remark that, even if the land on which defendant built his wall belonged to him, the question would still remain whether he had a right to build in such a manner as to obstruct the access of light and air to the plaintiff's house, and cause injury to his buildings by the rain-water.

The appellants also object that, inasmuch as the Judge held that there had not, in fact, been a partition, he was wrong in law in saying that the plaintiff had no right to ask for a partition. And we also think this objection is correct. Unless the Judge finds that the acts of the plaintiff, or those from whom he claims, have been such as to lead the other members of the family into a reasonable and well-grounded supposition that there has been a separation on the part of the plaintiff, and an acceptance of a defined portion of the property instead of his family share, and such as to induce them to make arrangements on the faith of it, he ought not to hold the plaintiff barred from the right which every member of a Hindoo family, who is *sui juris*, possesses of requiring a partition of the family property.

We accordingly remand the case for re-trial upon the whole cause with reference to the above remarks.

The 27th May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Ph

Judges.

Sales of attached property—Section 246 of VIII. of 1859, prospective.

Case No. 3164 of 1864.

Special Appeal from a decision passed by Judge of Patna, dated the 5th Au 1864, affirming a decision passed by Principal Sudder Ameen of that Dist dated the 10th May 1864.

Lokun Singh and others (Plaintiffs), *Appellants,*

versus

Deo Narain Singh and others (Defendar *Respondents.*

Baboos Kishen Succa Mookerjee and *S nath Doss* for Appellants.

Mr. C. Gregory for Respondents.

Section 246 of Act VIII. of 1859 (relative to inve gations of claims and objections to sales of attac property) is prospective, and does not apply to p proceedings in execution.

In December 1852 the property of Shere Mungel having been attached in e cution of a decree of Court, certain pers intervened, and laid claim to a portion o on the strength of some deeds of conveyan or assignment which they set up, and th claim was allowed by the Court.

In February 1857, the present plaintiff the sale of this very property in execut of the above-mentioned decree, purcha the rights and interests of Shere Mun therein, subject to the claim of the said tervenors, of which he had notice.

He afterwards brought a suit in the C Court against the said intervenors to aside the deeds upon which they based th claim as fraudulent and void, and to reco the interests so held by them. This s went by appeal to the Judge, who, on 25th February 1862, gave a decree agai him. It seems that the deeds in quest were conveyances made by the elder s of Shere Mungel after their father's dea but during the minority of some of th brothers, who had not all attained th majority in February 1862; and the Jud appears to have held that the suit was pr mature, inasmuch as the validity or inva dity of the deeds would depend upon wh ther the minors' consent should be given them when they came of age.

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The minors have since come of age, and repudiated the deeds.

On this repudiation, the plaintiff says that he is entitled to have the deeds declared void as against him, and to recover the property which has thus fallen back into Shere Mungel's estate, which he bought in 1857. He therefore brings this suit. Both the Lower Courts dismiss it on the ground that, as it has not been brought within one year of the establishment of the intervenor's claim in 1852, it is barred by the provisions of Section 246 of Act VIII. of 1859.

The plaintiff appeals to us specially on the ground that Act VIII. does not operate to take away any right of suit which the plaintiff possessed before the time when it became law.

We think this objection is valid. The words of Section 246 are eminently prospective, and there is nothing whatever to lead to the inference, even that the Legislature desired the Section to apply to past proceedings in execution.

The case must therefore be remanded for re-trial with reference to the above remarks.

The 27th May 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Portuguese Roman Catholics—Nuncupative Wills—Succession of intestates.

Case No. 3715 of 1864.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 19th September 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 31st May 1864.

Antony Rebeiro and another (Defendants), *Appellants,*

versus

Mrs. Sarah Rebeiro and another (Plaintiffs), *Respondents.*

Baboos Kalee Mohun Doss and *Chunder Madhub Ghose* for Appellants.

Baboo Kissen Succa Mookerjee for Respondents.

Quare.—Whether a Roman Catholic, of Portuguese extraction, can, under the law current amongst members of that Church in Chittagong, take under a nuncupative will; and, if not, to wha is a wife entitled under the law regulating succession of intestates amongst members of that Church.

The plaintiff in this case states that she and her husband were the descendants of Portuguese, and members of the Roman Catholic Church; that under the law of that Church she is, on her husband's death, entitled to half-share of his property; that, in the present instance, he, by a verbal will shortly before his death, cut down her right to a one-quarter share; that this devise by her husband was ratified by a deed executed by the defendant subsequently to her husband's death; and that, as he will not give her possession, she sues for the same.

The defendant pleads that he is not a Portuguese Roman Catholic, but a Feringhee Christian, and that, under the law applicable to the plaintiff and him, she is only entitled to maintenance. He pleads further that the deed executed by him was so executed by him when he was of tender years, and ignorant of the contents of the deed.

The Lower Appellate Court found that the parties were the descendants of Portuguese Roman Catholics, and that the deed executed by defendant was in the nature of a will, and therefore inoperative till his death; and that, under the law, as cited by Elberling, Section 233, which governs Roman Catholics of Portuguese extraction, when a deceased leaves issue and a wife, the wife takes half, and the issue the other half.

The defendant now appeals specially, urging: *1st*, that, as the Judge found that the deed executed by him was inoperative, he should have dismissed the plaintiff's claim; *2ndly*, that the Portuguese law cannot regulate this case between inhabitants of this country; and, *3rdly*, that there is no legal evidence on the record to show that the ancestor of the parties came from Portugal, and therefore the authority cited by Elberling will not apply.

The deed executed by defendant is clearly not a will. The finding of the Judge, therefore, to the effect that that document is inoperative till his death, cannot stand, and must be set aside.

The Lower Courts have found on good evidence that the parties before the Court are Roman Catholics of Portuguese extraction. With that finding we do not interfere, but we think that the other issues in the case have not been tried fully and sufficiently. Those issues are: *1st*, was the deed executed by defendant executed by him with full knowledge of its contents, and when he was of legal age? If this issue be

answered in the affirmative, the plaintiff's claim must be at once decreed; if it be answered in the negative, the remaining issues must then be tried. The *2nd* issue will be, is the nuncupative will set up by plaintiff proved or not? If it be, the *3rd* issue is, can the plaintiff, under the law current amongst members of the Roman Catholic Church in Chittagong, take under a nuncupative will or not? If she cannot take under such an instrument, the *4th* issue will then be, to what is plaintiff entitled under the law regulating successions of intestates amongst members of the Roman Catholic Church? It will be observed that it is upon the law of that Church, and not upon Portuguese law, that the parties base their separate claims. Hence the necessity of the issues now laid down. In deciding the law point, the Judge will call before him parties who are cognizant of the law of the Roman Catholic Church, examine them as experts, and will obtain from them the authorities upon which their answers may be based, and pass whatever orders seem just and proper.

The 29th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Registration (of contingent contract to sell)—Bona fide purchase without notice—Specific performance of contract—Damages.

Case No. 2816 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 25th June 1864, reversing a decision passed by the Moonsiff of that District, dated the 10th July 1863.

Ramtonoo Surmah Sircar (Defendant), *Appellant,*

versus

Gour Chunder Surmah Sircar (Plaintiff), *Respondent.*

Baboo Womesh Chunder Banerjee for Appellant.

Baboos Nil Madhub Bose and *Nuleet Chunder Sein* for Respondent.

The want of registration, not of a deed of sale or gift of land, but of a contract by *A* to sell land to *B* at some future time on receipt of balance of sum agreed on not then paid, is no bar *per se* to *B's* preferential claim over *C*, a subsequent purchaser, whose sale has been registered under Act XIX. of 1843.

If *C* purchased in good faith and without notice, and is in possession, his possession cannot be disturbed in consequence of *A's* non-fulfilment of his contract with *B*, but *B's* remedy is not by a suit for specific performance of contract, but by an action for damages.

THIS was a suit for specific performance of a contract under the following circumstances:—

Plaintiff, who is the special respondent before us, advanced 124 rupees to the defendant Ramtonoo, on a byenamah, dated Srabun 25th, 1269, B. S., in which it was stipulated that, on payment of a further sum of rupees 800, the plaintiff should receive defendant's share of the talook. Instead, however, of carrying out his bargain, defendant (special appellant) sold the land to a third party.

The defence is a simple denial of the whole transaction.

The Principal Sudder Ameen, on appeal from the Moonsiff, considered that the contract was proved; and that the plaintiff was entitled, on paying the 800 rupees, to specific performance, and to possession of the defendant's share in the talook. He reversed the first Court's order accordingly.

It is contended in special appeal that, as the deed of sale to the third party was registered, whilst that of the special respondent was not registered, the former is, under Act XIX. of 1843, entitled to precedence over the latter; and that this is not a case for specific performance even if proved, but for damages.

With regard to the first objection, we observe that Act XIX. of 1843 refers to deeds of sale or gift of land; but the deed propounded by special respondent is not a deed of that nature; it is simply a contract to sell land at some future time on receipt of a certain sum not then paid. The want of registration, therefore, of the first deed is no bar, *per se*, to the special respondent's preferential claim.

But, on the second point, we think there must be a remand for enquiry into the *bona fides* of the second conveyance. It is not denied that the third party is in possession; and, from the special respondent's contract not being registered, there is no reason to suppose that he purchased the estate after due notice of the claim upon it.

If the party in possession can prove that he bought the share in good faith for a valuable consideration, without notice, we think that his possession cannot be disturbed, in consequence of the special appellant's non-fulfilment of his contract with the special

respondent; but that the latter's only remedy in that case will be an action for damages.

Costs will follow the result.

The 29th May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Sale in execution of decree—What passes to purchaser.

Case No. 3126 of 1864.

Special Appeal from a decision passed by the Deputy Commissioner of Kamroop, dated the 29th August 1864, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 18th July 1864.

Captain J. C. Barton (Defendant), *Appellant,*

versus

Brijonath Surmah and others (Plaintiffs), *Respondents.*

Baboo Juggadanund Mookerjee for Appellant.

Baboo Poorno Chunder Mookerjee for Respondents.

A sale in execution of a decree is simply what the sale notification expresses it to be, namely, a sale of the rights and interests of the judgment-debtor.

PLAINTIFF sued to recover possession of lands of which he alleges that he has been dispossessed by Captain Barton, a purchaser at a sale in execution. The admitted facts in the case are these:

One Mohessur was the recorded proprietor in the Collector's Register of 16 annas of a certain property. The rights and interests of Mohessur were sold in execution of a decree against him. At this period, and before the sale, plaintiffs, alleging that they were co-sharers to the extent of one-third in the property advertised for sale, entered a claim for that one-third, and alleged that Mohessur's name was allowed to be entered as propriétor of 16 annas, because he was manager for three co-parceners, of which, however, he was only one, with a one-third share; and that he had possession of no more. No other party, however, claimed the other one-third. The sale having proceeded, one Buloram became the purchaser. A decree having afterwards been given against Buloram, his rights and interests in the same property were advertised for sale, and sold. Captain Barton, one of the defendants in this case, and the special appellant before us, became the purchaser. On this occasion, neither before nor after the sale till Captain Barton dispossessed them, did the special respondents in any way object to the sale? They urge that, as they were in possession, and as only the rights and interests of Buloram were sold, and those were only the rights and interests of Mohessur as originally sold, *viz.*, after notice of the claim and possession of special respondents of their one-third share, it was not necessary for them to make any objection to the sale.

On the other hand, special appellant urges that he is a *bonâ fide* purchaser for valuable consideration of the whole 16 annas, as that was the recorded right and interest of Mohessur, and consequently of Buloram according to the Collector's Register; and as no declaration of right to the one-third claimed by special respondents followed their objection when Buloram bought; and as when special appellant bought, special respondent had given no notice whatever of any claim, which, it is urged, they ought to have done, if they wished to question Captain Barton being the rightful purchaser of 16 annas of Buloram and Mohessur.

In the first place, we may notice that it is admitted that Captain Barton only bought the rights and interests of Buloram, and that Buloram was *not* recorded as proprietor of 16 annas.

In the next place, the question is not to our mind that of the right of what is called a purchaser for valuable consideration without notice, but the simple one of whether Captain Barton obtained by purchase what the plaintiff now sues for. We think he did not. He purchased the rights and interests of Buloram, *whatever they might be*, so much, and neither more nor less. Now, Buloram was *not* the recorded proprietor of 16 annas; but, even if he had been, the fact for the purposes of a sale in execution is only a clue to title, not a title. The sale in execution is not of the 16 annas rights and interests of a party recorded in the Collector's Register to have 16 annas; still less is it a guarantee of 16 annas or any other amount of property. A sale in execution is simply what the sale notification in express terms says, it is "a sale of the rights and interests of a party, whatever they may be," in certain property.

This is most clearly laid down by the late Sudder Dewanny Adawlut, in page 486

of the Reports for 1857, Munoruth Roy and others, appellants, and we fully concur in the conclusions of that decision expressed in these terms: "In fact, in an execution "sale, the stipulation that something does "exist is absolutely withheld. Plaintiff "purchased the rights and interests of "Agund Roy, whatever they might be, within "a 2-anna share of Mouzah Monear-"pore and two other villages. Afterwards "it turned out that Agund Roy held *no* "rights and interests in those villages; "but plaintiff took his chance of this. The "sale did not assure him of the existence "of any property; he was, on the contrary, "constrained to satisfy himself in the matter, "and he has no valid ground to repudiate "the sale."

We, therefore, think that the special appeal in this case is untenable, and we dismiss it with costs.

The 29th May 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Hindoo Law—Adoption.

Case No. 393 of 1864.

Regular Appeal from a decision passed by the Judge of Mymensingh, dated the 12th April 1864.

Gobind Soonduree Debia (Plaintiff), *Appellant,*

versus

Juggodumba Debia and Bama Soonduree Debia and others (Defendants), *Respondents.*

Mr. G. C. Paul and *Baboos Chunder Madhub Ghose* and *Sreenath Doss* for Appellant.

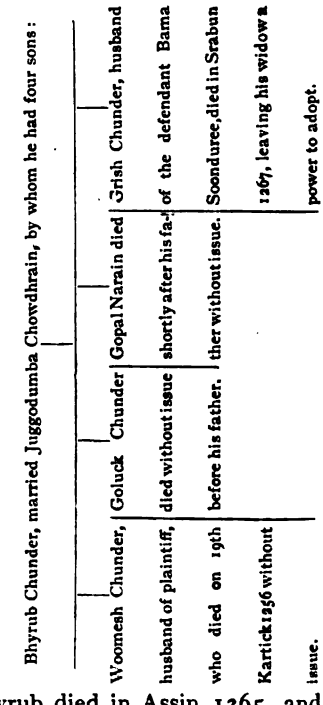
Mr. R. V. Doyne and *Baboos Unnoda Pershad Banerjee* and *Nil Madhub Sein* for Respondents.

Suit laid at rupees 49,981-11 as. 4 ps.

A claim to adopt disallowed in the case of a Hindoo woman, who, so long as any male member of her husband's family was alive, took no steps to carry out her husband's permission to adopt, but who, so soon as the last male member died, and the property devolved on the last male member's widow, tried to obtain possession by the alleged dormant permission to adopt.

THIS suit was brought to recover possession of certain landed property mentioned in the plaint left by Bhyrub Chunder Chowdhry, the maternal grandfather of Bykunt Chunder, the son of the plaintiff, adopted, as is alleged by her, by permission of her deceased husband, Woomesh Chunder Chowdhry, with the consent of his father, the said Bhyrub Chunder.

The family tree is as follows:—



Bhyrub died in Assin 1265, and his property went to his surviving sons, Gopal and Grish Chunder. On the death of Gopal his share of the property devolved on his mother Juggodumba, who made it over by gift to her sole surviving son Grish Chunder and, in company with the plaintiff, Gobind Soonduree, proceeded in the month of Pous 1266 to Benares, intending to spend the remainder of her life in the holy city. The death of Grish Chunder, however, in 1267 appears to have made an alteration in their plans, and they returned home in 1267, and in the following year, plaintiff presented a petition, stating that her husband had left her permission to adopt, and in 1269 instituted the present action.

The allegation of the plaintiff is to the effect that her husband Woomesh Chunder, during his last illness in Kartick 1256, gave her, with the consent of his father Bhyrub Chunder, permission to adopt five sons in succession. This permission was first given verbally in the presence of witnesses, and was reduced to writing two days after, and duly signed by Woomesh Chunder, attested

by the subscribing witnesses, among whom was Bhyrub Chunder, who affixed his seal and signature to the instrument. The document was left in the custody of Bhyrub Chunder, and, on his death, fell with his other papers into the hands of his son Grish Chunder, whose widow has failed to produce it if it be still in existence.

Abundance of oral evidence has been produced to prove the fact of the permission having been given, first verbally, and then in writing; but we entirely discredit the whole of the evidence except that of Dr. Elton, knowing how easy it is, when family disputes arise, to raise claims such as is made in the present case, and to support them with any amount of oral evidence, even that of the nearest relatives of the family who generally range themselves on one side or the other, and who cast aside all regard for truth in order to secure the success of the party, whose cause they have espoused; and our past experience tells us that such is particularly the case in suits to uphold or set aside alleged acts of adoption in zillah Mymensingh. There are, however, reasons beyond this general one, which, in our opinion, render this testimony utterly worthless, and lead us to believe that the present is merely an impudent attempt to get the property out of the possession of the widow of the youngest son of Bhyrub, the widow of the eldest brother being pitted against her by interested persons, who have their own ends to gain. We find that Woomesh Chunder died in 1256; that, from that time till 15th Assin 1268, a period of twelve years, nothing was done by the plaintiff in furtherance of the permission to adopt, which, as she alleges, she had received from her husband. No publicity was given to this instrument; no care was taken to register, nor to keep it in her own custody, and the instrument itself is not to be found. But plaintiff comes into Court with a plausible tale that she was too young to take care of the paper when her husband died, and so made it over to her father-in-law, from whose custody it passed, on his death, to that of his son, and thus on his widow she casts the *onus* of producing it, or the odium of having destroyed it. After the death of her father-in-law she allowed her brothers-in-law to take possession of the estate, made no attempt to make the adoption, an act which would have secured to her, as guardian of a minor adopted son, a large share of the family property, but she proceeded with her mother-in-law to Benares, apparently with the purpose of spending the remainder of her life there, when the unexpected death of her youngest brother-in-law brought her back to the family residence, prepared to contest with his widow the right to the possession of the property, and to support her claim by any amount of hard swearing which unscrupulous parties about her do not hesitate to put forward in her behalf. So long as any male member of her husband's family remained alive, she took no steps to carry out her husband's permission to adopt, but no sooner has the last male member deceased, and the possession of the property devolved on his widow, than plaintiff suddenly starts up from her long sleep, and tries to get possession by an alleged dormant permission to adopt, there being no other possible means by which she or those who are acting in her interests could obtain a share in the plunder. The evidence of Dr. Elton is to the effect that, when he was Civil Surgeon of Mymensingh, some 14 or 15 years ago, he attended Woomesh Chunder in his last illness, and that his father Bhyrub Chunder told the witness that Woomesh Chunder had given his wife Gobind Soonduree a written power to adopt, which, however, he would not register, as he had then three other healthy sons by whom he hoped the family would be continued. This statement, however, made some fifteen years after the conversation took place, is after all only hearsay. The witness did not see the instrument, and it appears very improbable that, had it been in existence, and in his possession, Bhyrub would have neglected to have had it registered, or at least to have shown it to his friend, the Civil Surgeon, who was also the Registrar of Deeds. We think this adoption is entirely wanting in those marks which give validity to an adoption laid down so clearly and precisely in the judgment of the Sudder Court, in the case of Ranee Mun Mohinee, page 246 of the Reports for 1857, and again in the case of Ranee Kistomonee, page 1127 of the Reports for the same year, and, under the view of the case expressed above, we confirm the decision of the Lower Court, and dismiss the appeal with costs.

The 30th May 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Alluvial Lands.

Case No. 2355 of 1864.

Special Appeal from a decision passed by Baboo Gopeenath Bose, Principal Sudder Ameen of Nuddea, dated the 28th May 1864, modifying a decision passed by the Moonsiff of that District, dated the 31st July 1863.

Mr. Thomas Kenny (Defendant), *Appellant,*

versus

Beebee Sumeeroonissa (Plaintiff) and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Mohindro Lall Shome* for Appellant.

Mr. C. Gregory and *Baboo Mohinee Mohun Roy* for Respondents.

Proof of re-formation on an old site will not suffice to establish a claim under Regulation XI. of 1825. When the land has been completely diluviated, all claim to the site is gone, and all re-formations are governed by Clauses 1 and 3, Section 4, Regulation XI. of 1825. A claim to hold the land under Clause 2 can only be maintained by the old proprietors, when the land has not been diluviated, but cut off by a change of the stream.

THIS is one of those most unsatisfactory cases in which a new Officiating Principal Sudder Ameen, by an unintelligible and irregular order, has admitted a review of his predecessor's decision, and reversed it. Nor is the present judgment by any means clear.

It appears, however, that the Principal Sudder Ameen's decision rests entirely on the doctrine that, when land having been diluviated a re-formation takes place on the old site, the former owner is entitled to re-acquire the re-formed lands. He finds on the evidence of witnesses that the disputed plots are re-formations on the site, where plaintiff's lands formerly diluviated. It does not seem to have been at any time supposed that a claim to re-form lands could be supported on such evidence; but only that, when there were actual means of identification on the land itself, it could be re-claimed. A Full Bench has, however, lately held that proof of re-formation on an old site will not suffice to establish a claim under Regulation XI. of 1825. When the land has once been completely diluviated, and washed away by a great river (not merely temporarily inundated or partially submerged), all claim to the site is gone, and all re-formations are governed by the ordinary law of accretion, *i. e.*, Clauses 1 and 3 of Section 4 of Regulation XI. of 1825. A claim to hold the land under Clause 2 can only be maintained by the old proprietors when the land used by man has not been diluviated, but is cut off by a change of the stream—fields, trees, houses, or other surface objects remaining as before. In this case it is stated by all the Courts that the former lands have diluviated, and that those now disputed are new formations.

The principle adopted by the Principal Sudder Ameen is wrong. Clause 2 does not apply. There is no question of island under Clause 3, and the case must be remanded to be tried simply under Clause 1, Section 4 of Regulation XI. of 1825, that is, to find to whose land have the new formations accreted.

The proprietors of the old land immediately adjoining, on what may be called the landward side, that is lying parallel to the river channel, will take the new lands. It is not clear from the maps and proceedings to whom these lands belong, and the case must, therefore, go back. Remand accordingly.

The 31st May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Limitation—Cause of action—Mesne-Profits—Costs.

Case No. 50 of 1865.

Regular Appeal from a decision passed by Moulvie Syud Emdad Ali Khan, 1st Grade Principal Sudder Ameen of Tirhoot, dated the 26th November 1864.

Ekbal Ali Khan (Plaintiff). *Appellant,*

versus

Kalee Pershad and others (Defendants), *Respondents.*

Baboo Unnoda Pershad Banerjee for Appellant.

Messrs. C. Gregory, A. F. Lingham, and *J. Baptist* for Respondents.

Suit laid at rupees 17,259-4 as. 2 p.

The date of dispossession is the date when the cause of action arises in suits for mesne-profits.

Reasons should be given when the ordinary rule for costs is varied.

PLAINTIFF in this case sued for mesne-profits from the 6-anna kist of 1256 to 1265 F.

The defendant No. 1, amongst other pleas, pleaded limitation under Clause 16 of Section 1 of Act XIV. of 1859.

Other defendants pleaded that they had no concern with the property, the mesne-profits of which were the subject of suit, and prayed to be exempted from costs.

The Lower Court, looking upon the Full Bench judgment in the case of Anund Gobind Chowdhry, dated 2nd April 1864, as ruling that the date of dispossession is the date when the cause of action in suits for mesne-profits arises, found that the plaintiff had not sued in time for the mesne-profits claimed from 1256 F. to 1264 F.; but that he was in time as to those of 1265 Fuslee. The Principal Sudder Ameen gave a decree accordingly.

It is necessary to give the decretal order which was in these terms :—

"The decree, in modification of the claim "in favor of the plaintiff, is that rupees 844-14, "principal of mesne-profits for 1265 Fuslee "and costs of the suit in proportion to the "amount allowed, with interest on the "whole, from the date of the decision to that "of realization, shall be paid by defendants "No. 1. Kalee Pershad, and Gujraj Suhay "to the plaintiff; that the remaining de-"fendant be exempted from the liability of "the claim; that the costs of the defend-"ant No. 1, in proportion to the amount "disallowed, shall be deducted from the "amount payable to the plaintiff; and that "the costs incurred by the *other defendants* "with interest from the date of decision to "that of realization, in proportion to the "amount of the claim proved, shall be borne "by *defendant* No. 1, and in proportion to "what is disallowed by the plaintiff."

Plaintiff appealed, and his pleader cited a case of the 22nd February 1864, Loch and Glover, JJ., as opposed to the Principal Sudder Ameen's judgment. But we think that the Full Bench judgment cited by the Principal Sudder Ameen, and that of this Bench of 17th September 1864, and of Trevor and Campbell, JJ., 31st August 1864 (Weekly Reporter, page 65), and Morgan and Shumbhoonath Pundit, JJ., 2nd April 1864, are all *opposed* to the single case of the one Division Bench cited by the appellant's pleader. That precedent, we may remark, does not appear to have been cited to us when we heard the case of the 17th September 1864 (*vide* Weekly Reporter, page 83). On the rulings, then, of the Full Bench, and of the majority of the Judges, we are of opinion that the decision of the Principal Sudder Ameen is correct.

It is then urged, on appeal, that costs have been charged against the plaintiff, as for the amount of his claim which has been disallowed, in separate sums of 479 rupees for each defendant, whereas, as all defendants might have come in by one pleader and one pleading, 479 rupees should have been only charged as *total* costs of all defendants.

We are not shown that the defendants had not separate interests, or could have come in on one pleading and by one pleader; but, even if it were so, the proper course for plaintiff would have been to have raised the objection before the Lower Court, and have sought for amendment at once by that Court, which is to be presumed to have exercised a proper judicial discretion until the contrary be shown. Looking at the answers of the several parties, whom plaintiff chose to make defendants below and respondents here, and who all plead to be utterly unconnected with the property, we do not think that any one but plaintiff should pay the costs.

In this view, we decree the cross-appeal of defendant No. 1, who appeals against the order of the Lower Court which made him responsible for the costs of the other defendants. As regards the amount allowed to plaintiff, no reason is given for this order as to costs; and if there was any reason, it should have been stated, which is the rule when the ordinary practice of the Court as to costs is varied, as it is here, by the order appealed against by defendant No. 1.

We accordingly dismiss the plaintiff's appeal, and decree the cross-appeal of defendant No. 1 on the above point of costs of the other defendant's charged to defendant No. 1.

The 31st May 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Lakheraj—Onus probandi—Limitation—Auction purchasers.

Case No. 617 of 1864.

Application for review of judgment passed by Justices Trevor and Campbell, on the 9th of August 1864, in Special Appeal No. 1932 of 1863.

Mr. A. J. Forbes (Respondent), *Petitioner,*

versus

Sheikh Meah Jan and another (Appellant), *Opposite Party.*

Mr. T. T. Forbes for Petitioner.

No one for Opposite Party.

The mode in which the *onus* of proving a lakheraj holding from the period of the Permanent Settlement is to be thrown on an auction-purchaser at a sale for arrears of revenue coming under Clause 14, Section 1, Act XIV. of 1859, and suing within 12 years of his purchase.

THE Full Bench having decided that the Civil Court has concurrent jurisdiction in regard to suits to recover or assess lands wrongly held without payment of revenue from a date subsequent to 1790, the ground of want of jurisdiction previously allowed is gone, and we must try this appeal on other grounds.

We find that the case is one instituted on 23rd July 1862, after Act XIV. of 1859 came into operation; and that plaintiff is an auction-purchaser at a sale for arrears of revenue, coming just within twelve years of his purchase, which occurred on 24th July 1850. The ruling of the Full Bench in regard to limitation and *onus* of proof, therefore, does not apply to this case, which is governed by Act XIV. of 1859, Section 1, Clause 14. With *reference*, then, to the provisions of that Section, plaintiff cannot be barred unless "it is shown that the land has been held lakheraj, or rent-free, from the period of the Permanent Settlement." The real question is, does defendant prove possession from 1790? And so far the *onus* is upon him. But that *onus* must not be imposed in a harsh way, such that after so long a lapse of time an honest holder cannot bear it, and *bonâ fide* holdings may be unjustly imperilled. It is not necessary that the defendant should give direct proof of holding to the exact date of the Permanent Settlement; but that he should give such evidence of long possession of the character and repute of his holding, and otherwise, that (after weighing also any evidence on the other side) the Court may be led to believe that the holding is really one of ancient date as old as the Permanent Settlement, and not a modern appropriation. We cannot consider the decision of the Lower Appellate Court so summary and brief to be a proper decision of the case treated in this way. The case must be remanded for a full and careful decision after going into the evidence in the manner above indicated; and as it may be doubted whether the parties have understood the mode in which the *onus* is to be thrown on them, we direct that the case should go back to the first Court, and that an opportunity should again be given to the parties of filing any evidence which they may possess.

The 7th June 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Sales under Regulation VII. of 1825—Irregularities—Sections 257 and 387, Act VIII. of 1859—Limitation.

Case No. 3083 of 1864.

Special Appeal from a decision passed by the Additional Judge of Bhaugulpore, dated the 23rd July 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 15th December 1862.

Musst. Bhoobun and others (Plaintiffs), *Appellants,*

versus

Sheikh Oozutool Huq and others (Defendants), *Respondents.*

Messrs. R. T. Allan and *C. Gregory* for Appellants.

Baboo Onoocool Chunder Mookerjee for Respondents.

Neither Section 257 nor 387, Act VIII. of 1859, applies to a suit to set aside a sale made under Regulation VII. of 1825 before Acts VIII. and XIV. of 1859 came into operation, and consequently the plaintiff had 12 years within which to sue.

Irregularities occurring in a sale under Regulation VII. of 1825 are not sufficient to vitiate the sale, unless they cause injury to the party suing.

PLAINTIFF instituted the present suit on the 12th February 1861 to set aside a sale, made on the 3rd July 1854, irregularly, and not under the forms prescribed by Regulation VII. of 1825.

The first Court dismissed the suit, and on appeal, the Judge, citing Sections 257 and 387 of Act VIII. of 159 as his authority, dismissed the suit as not maintainable.

Plaintiff now appeals specially, urging that neither Section cited by the Judge is applicable to the present case; that Section 257 of Act VIII. of 1859 only regards sales made under that Act, and Section 387 only applies to cases pending at the time of the passing of Act VIII.; that he had by law twelve years to institute his present suit; and as he brought it within time, it should be remitted and investigated on the merits.

There can be no doubt, as contended by the plaintiff, that Sections 257 and 387 of Act VIII. of 1859 cannot be applied to the present case. It was, moreover, instituted in 1861, before Act XIV. of 1859 came into

eration; consequently, plaintiff had twelve ars within which he might sue. He is arly in time, and his suit must be remitted enquiry on the merits. The Judge will e care to apply to this case the principle icable to all irregularities occurring in under Regulation VII. of 1825, *viz.*, that are not sufficient to vitiate the sale, ess they have caused injury to the party g—injury which must be clearly proved e Court's satisfaction.

The 8th June 1865.

Present :

Hon'ble C. B. Trevor and G. Campbell, *Judges.*

ort—Building House on another's land.

Case No. 3601 of 1864.

cial Appeal from a decision passed by e Principal Sudder Ameen of Hooghly, ted the 15th September 1864, reversing decision passed by the Sudder Moonsiff f that District, dated the 29th November 862.

bind Puramanick (one of the Defendants), *Appellant,*

versus

oroo Churn Dutt and others (Plaintiffs), *Respondents.*

Baboos Luckhee Churn Bose and *Motee Lal Mookerjee* for Appellant.

boo Toolsee Doss Seal for Respondents.

en a trespasser tortiously enters upon the land ther, and builds a house thereon, the party in- is entitled to recover possession of the land by ying the house, if there is no proof of acquies- on his part in the act of injury done.

LAINTIFF, as the under-tenant of one d Chunder, who is himself a tenant e zemindar, sues defendant for posses- of a small area of land on which defend- have built a pucka house, by breaking the same. Plaintiff alleges that he forcibly ousted by defendant, on the 2nd an 1267, of the land in dispute, and he s this suit in the month of Pous 1269.

efendant denies the title of plaintiff and having dispossessed the plaintiff, and s that he obtained in 1265 a pottah of land, which had been fallow for more 12 years, from the zemindar, and has a house thereon; that consequently iff has no valid claim to the land.

e first Court gave plaintiff a decree for ion, declaring him entitled to the rents of the house from the defendant. The Lower Appellate Court gave plaintiff a decree finding his title proved, and, as the possession of the defendant was tortious, he decreed to the plaintiff possession; the defendant being at liberty to take away the bricks of the house, and plaintiff entitled to destroy the house.

Defendant now appeals specially, urging that, as the plaintiff stood by and allowed him to build the house, he is entitled to hold on paying ground-rent for the house to the plaintiff.

There are undoubtedly cases in the books in which it is ruled that a co-sharer, if he stands by and allows another sharer to build a house on the common property, cannot afterwards sue successfully to have the same pulled down: he must be content with a remedy for any injury which he has sustained in some other form. But, in the present case, we have a trespasser who has tortiously entered upon the land of another, and built a house thereon. Without going so far as to say that, under no circumstances could acquiescence by the party injured in the act of the injury done be inferred, we are clearly of opinion that no such acquiescence was either pleaded or proved in the present case. We, therefore, think the plaintiff is clearly entitled as against the defendant, a trespasser, to possession of his land, leaving defendant at liberty to remove the bricks of his house. Under this view, we see no reason for interfering with the judgment of the Principal Sudder Ameen, but dismiss the appeal with costs.

The 9th June 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Mahomedan Law—Pre-emption—Rights of sharers.

Case No. 3286 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 22nd August 1864, reversing a decision passed by the Moonsiff of that District, dated the 23rd December 1862.

Moharaj Singh (Plaintiff), *Appellant,*

versus

Lalla Bheechuk Lal (Defendant), *Respondent.*

Baboo Poorno Chunder Mookerjee for Appellant.

Baboo Debendro Narain Bose for Respondent.

Where there is a plurality of persons entitled to the privilege of pre-emption, the right of all is equal without reference to the extent of their shares in the property.

THE only point pressed on us for decision is that, on the finding of the Appellate Court, the plaintiff, holder of a 4-anna share in a joint undivided estate, of which the defendant has a 12-anna share, is at any rate entitled equally with the defendant to a right of pre-emption.

On turning to the Hidaya, book 38, Chapter I., page 566, we find this contention to be correct. The Mahomedan Law Doctors lay it down that, where there is a plurality of persons entitled to the privilege of Shuffa, the right of all is equal, and no regard is paid to the extent of their several properties. The same authority distinctly lays it down that the argument of one learned Doctor to the contrary effect, *viz.*, that the right was proportionate to the extent of the property, was not sound, and was not accepted by the majority of Mahomedan Doctors.

Applying, then, this principle to the case before us, and to the facts as found by the Lower Appellate Court, the plaintiff would be entitled, though he has only a 4-anna share, to one-half of the *putti* sold, equally with the defendant, though the latter has the larger and a 12-anna share.

The decision of the Lower Appellate Court must be set aside, and the plaintiff is hereby declared entitled to one-half of the property in dispute, on payment, within one month, of one-half of the *putti*. Both parties may bear their own costs in this appeal.

The 10th June 1865.

Present:

The Hon'ble C. B. Trevor, G. Loch, H. V. Bayley, and W. Morgan, *Judges.*

Lakheraj (Resumption and assessment of)—Under-tenures (Rights of).

Case No. 2577 of 1862.

Special appeal from a decision passed by Mr. J. C. Dodgson, Judge of Mymensing, dated the 10th July 1862, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 26th August 1861.

Furzal Banoo and others (Plaintiffs), *Appellants,*

versus

Azeezunnissa Beebee and others (Defendants), *Respondents.*

Baboos Onoocool Chunder Mookerjee and *Chunder Madhub Ghose* for Appellants.

Baboo Nil Madhub Sein for Respondents.

By the resumption and assessment with revenue of a lakheraj tenure by Government, an under-tenure is not destroyed. The under-tenant may relinquish his lease if he think fit, or he is entitled to be maintained in his holding upon his engaging with the lakherajdar to pay the Government revenue.

THE plaintiff in this case was a sub-talookdar, who held his tenure by virtue of a contract with his superior holder, the lakherajdar. At the time at which that contract was entered into, which, on the statement of the tenant, was before the acquisition by Government of the Dewanny, the lakherajdar's estate was not subject to the payment of revenue: subsequently the Government resumed the property, and assessed it with revenue. Certain proceedings have been brought before the Court into which it is not necessary here to enter; it is sufficient to state that the result of a case under Act IV. of 1840 has placed the defendant, the zemindar, in possession. The plaintiff, therefore, sues in the present case for possession of his shikmee talook, of which he had been illegally dispossessed under the operation of Act IV. of 1840. The defendant below pleads that the plaintiff held no shikmee talook in his estate, and that, if he did *previously* to the resumption of the lakheraj holdings, the title of the plaintiff to an under-tenure had lapsed, as repeatedly ruled by the late Sudder Court.

Both the Lower Courts dismissed the plaintiff's suit on the ground that, in the absence of express special condition in the lease of the plaintiff under the ruling of the Sudder Court in the case of Mohunt Sheo Doss *vs.* Beebee Ikram and Beebee Mariam, decided on the 2nd May 1850, it had fallen in, and become void on, the resumption of the lakheraj tenure.

Decisions for 1850, page 167.

Two Judges of this Court, on the matter coming before them in special appeal, dissented from the ruling of May 1850 above cited, on which the judgment of the Lower Court was based, and also from another decision passed on the 25th June 1860, which seems to confirm the previous ruling. They have, therefore, referred the question to a Bench of five Judges.

Decisions for 1860, pages 660 & 661.

When a lakherajdar has entered into a contract with a tenant, whether for a term or in perpetuity, both parties are, in strict law,

bound to the conditions of the contract. We therefore do not think that the mere resumption of the lakherajdar's tenure by Government, that is, the mere fact that that tenure has been rendered liable for the payment of revenue, can of itself, as a matter of law, dissolve the contract entered into by the two parties. Looking to the unexpected and unforeseen nature of the Government act, which has declared that a certain proportion of every beegah of the tenure must be paid in perpetuity to Government by the zemindar, it appears to us that, although it may be in the option of the tenant to determine the tenancy, he may consent that what the *vis major* of Government has taken from the land shall be added to the original engagement so as to enable the zemindar to hand over the same to Government. and thus the parties will be left, as between themselves, exactly in the position in which they were before the resumption. The under-tenure, as to its duration, will not be interfered with; but during its currency the revenue, which has been assessed on the lakherajdar, will be added to the original jumma. But the tenant is, we think, at liberty to throw up his tenure, if he declines to enter into any engagement with the lakherajdar, now become the owner of a revenue-paying estate. If a tenant under the circumstances now before us asks for relief from the Court, we think that, as he who requires equity must do equity, he is not entitled to be re-instated in his former position, leaving to the zemindar the whole burthen of discharging the Government revenue. We do not consider ourselves on the present occasion required to pronounce an opinion whether, in the event of the tenant refusing to come under any obligation for the payment of the Government revenue, he has a right to be maintained in his holding on any other or what equitable terms.

The 13th June 1865.

Present :

The Hon'ble *Sir* Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, J. P. Norman, and Shumbhoonath Pundit, *Judges*.

Limitation (Plea of, by Government as owner of Ghatwalee lands, and by Ghatwals)—Adverse Possession—Uncultivated lands.

Case No. 2715 of 1863.

Special Appeal from a decision passed by Mr. G. C. Fletcher, Judge of West Burdwan, dated the 16th June 1863, affirming a decision passed by Banee Madhub Shome, Principal Sudder Ameen of that District, dated the 23rd September 1861.

Messrs. R. Watson and Co. (Plaintiffs), *Appellants*,

versus

The Government and others (Defendants), *Respondents*.

Mr. R. T. Allan and *Baboos Onoocool Chunder Mookerjee* and *Mohinee Mohun Roy* for Appellants.

Baboo Kishen Kishore Ghose for Respondents.

Suit for reversal of a survey award demarcating certain lands as ghatwallee and as held under the Government. HELD that, in such a suit, adverse possession and limitation can be pleaded by the Government and the ghatwals (*Trevor and Norman, JJ.*, dissenting).

Adverse possession may be pleaded to bar a claim as regards uncultivated lands in the same manner and to the same extent as regards cultivated lands.

This case was referred to a Full Bench with the following order:—

Norman, C. J., and E. Jackson, J.—THIS is a suit instituted by the plaintiffs in 1856, for the confirmation of their *mál* right in 3,162 beegahs of land as appertaining to mouzah Bunkadoho, in reversal of a survey order made by a Deputy Collector for the demarcation of the, whole as part of mouzah Chota Bunkadoho, dated the 26th of April 1855.

The plaintiffs are putneedars of Lot Koororeah, purchased by them in 1839, at a sale under Regulation VIII. of 1819. Their case is, that the lands in dispute originally formed part of the permanently settled estate Pergunnah Bishenpore, within which were certain ghatwallee lands; that in 1802 the Rajah being unable to control the ghatwals, or for some other reason, and in consideration of a deduction from the revenue payable by him to Government, made over the whole of the ghatwallee lands, comprising an area of 35,955 beegahs, to the Government; that, a separate jumma having been fixed on the ghatwallee tenure, it was recorded in the Collectorate as a distinct and separate estate; that the ghatwal defendant having cultivated land within the putnee talook, of which former putneedars were in possession, the plaintiff demanded rent, but the ghatwal defendant refused to pay; that the Deputy Collector subse-

quently demarcated the boundaries, and prepared a map, describing the land as included in the ghatwallee tenure under the name of 33 pharrees of mouzah Chota Bunkadoho.

The suit is instituted for the correction of this map, and for the confirmation of the plaintiff's *mál* right. The ghatwal and the Government (the latter appearing in this Court as principal defendant) separately pleaded limitation.

The first Court and the Lower Appellate Court concurred in dismissing the suit on the plea of limitation, on the ground that the plaintiff did not prove that he had been in possession of the land within twelve years, and from that decision the plaintiffs appeal.

It is necessary to observe that the possession of these lands by the ghatwal defendants in whose hands they were liable to assessment as *towfeer* is a very different thing to possession by a neighbouring zemindar of lands which he claims as within his boundaries. If a ghatwal in course of years obtained possession by encroachment of *mál* lands not originally included in his tenure, he could not, in a suit for assessment or for *khas* possession, after refusal by the ghatwal to make a settlement, plead as against the owner of the zemindary that the zemindar had not been in possession within twelve years. That point was expressly decided in Koylashnath Roy *versus* Roop Singh Sirdar and others, November 24th, S. D. A. 1858, p. 1713; Select Cases, S D. A. 1862, p. 284; Koylashnath Roy *versus* Jugunnath Sircar, S. D. A. 1862, p. 292. This proceeds upon the well-known principle that the general Law of Limitation is inapplicable as against a zemindar in suits for the assessment of rent on lands within his zemindary (*see* Sheikh Shafaetoollah *versus* Joy Kishen Mookerjee, 7 Select Reports, p. 499, and Precedents, S. D. A. Rep., 1850, pp. 158, 494). The case of tenures held as lakheraj from before 1790 is an exception to the general rule that limitation cannot be pleaded in such cases.

The cause of action in a suit for assessment by a zemindar is said to be a continually recurring one (Degumbur Mitter *versus* Ram Soondur Mitter, S. D. A. Rep., 24th July 1856, p. 617). Till the right to assess has been repudiated by some distinct act, the zemindar is not put to his right of action. Therefore, as against the person within whose zemindary or *mál* lands those now in question may turn out to be situate, whether the Government, the Rajah of Burdwan, or the putneedar, appellant, it would seem that the ghatwal could not plead limitation.

This seems to be a totally different question from the question whether the ghatwal could plead limitation to a suit for possession and mesne-profits from the date of an alleged dispossession, treating him as a mere trespasser. No doubt, to such a suit twelve years possession, without payment of rent, would be an answer. (*See* Mirtoonjoy Pauree *versus* Omesh Chunder Paul Chowdry, 31st October 1849, S. D. A. Rep., p. 411; Ram Chunder Paul Chowdry *versus* Punchoo Mundul, 8th May 1855, S. D. A. Rep., p. 253.)

Again, if the ghatwals could show that for twelve years they had paid rent specifically for those lands to the Government and that the Government had, at any time more than twelve years before suit, asserted a title to those lands as maliks or zemindars adversely to the putnee title of the plaintiff the suit might be barred by limitation.

If the land shall, on enquiry, appear to be within the zemindary of Bishenpore, and comprised within the putnee talook of the plaintiff, the mere omission to take steps to assess rent on the lands, or to have them declared *mál* for more than twelve years, appears to us not to be a bar to this suit, which is to obtain a declaration of the plaintiff's *mál* right. The right of action appears to date, not from the time when the ghatwals may appear first to have been in possession without payment of rent, but from the date when such possession was adverse to the putneedar. That is not merely the result we arrive at by our own reasoning, but accords with the principle established by the case of Goor Pershad Roy *versus* Moulvie Abdoo Ali, S. D. A. Rep., 1850, p. 491.

It does not appear from the judgment of the Court below, nor can we infer, that there was any such adverse possession prior to the date of the survey award demarcating the lands as ghatwallee, and consequently as held under the Government.

Another question of considerable importance and difficulty might arise if those lands turn out to be, in fact, part of the decennially settled lands of the zemindary of Bishenpore, and in respect of which the Government are yearly in receipt of revenue as such *viz.*, whether the Government can, in its character of malik or owner of an adjoining zemindary, plead limitation in a boundary suit as against the claim of the zemindar to recover any portion of his decennially settled lands encroached on by the ryots of the Government.

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These points do not appear to have been adverted to in the cases of the Collector of West Burdwan *versus* Messrs. Watson and Co., 18th June 1860, S. D. A. Rep., p. 643, and the Government *versus* Maharajah Dheeraj Mahatab Chunder Bahadoor, 16th March 1863, High Court Decisions published by Hay, p. 384. And, as our decision is at variance with the former case, and the point involved is one of importance if the parties desire it, the point may be re-argued before a Full Bench. If no application for that purpose is made within three days, we order that the case be remanded for trial with reference to the above observations; and, in going into the merits, if that becomes necessary, the Lower Court will enquire, not only whether the lands now claimed were surrendered to the Government in 1802, but also whether they were included in the putnee talook whereof the plaintiff is the purchaser. And with reference to the question of limitation as to such part of the land as is or was wholly waste, unoccupied, or jungle, it must be remembered that it is not enough to show that the plaintiff was not in possession unless it can be shewn, or must be inferred that the lands were actually held, or a substantial claim asserted to them by some other person.

The case was accordingly heard by a Full Bench, consisting of Norman, C. J., and Trevor, Loch, Shumbhoonath Pundit, and Levinge, JJ.

Norman, C. J.—This case having been re-argued before a Full Bench at the request of the respondent, and in pursuance of the permission given to that effect, we think that limitation will not apply to the claim of the putneedar to enhancement, if the lands in dispute were originally included in the decennially settled estate of Bishenpore, and were not surrendered by the zemindar to the Government under the arrangement in 1862.

Shumbhoonath Pundit, J.—In this case, it appears to be an admitted fact that the Permanent Settlement was made with the Rajah of Bishennuggur of his zemindary, together with certain ghatwallee lands held by ghatwals, and that afterwards it was found expedient to detach the ghatwallee lands from the estate, and to give some remission of revenue to the zemindar. These lands were then, and are still, mostly jungle and hilly tracts with very little cultivation, and so their exact boundaries and quantity it was not easy to know and determine at the time of this separation.

The plaintiff is a putneedar under the zemindar, and the Government and the ghatwals oppose his claim, and plead limitation, on the ground that the lands claimed by him have been held since the separation by the ghatwals as parts of their ghatwallee tenures. The ghatwals pay only a quit-rent for the lands they hold, and, when called upon by the Government to put in lists of the lands held by them, are said to have represented themselves as holding much less than they actually did and do hold.

Now, with regard to the lands not under cultivation, no question of adverse possession can arise; but, with regard to the lands said or proved to be under cultivation, it is not improper to apply the Law of Limitation when the plaintiff has failed to prove that they were, as he has asserted, held by him under the right derived long ago from the zemindar. The arguments of his pleader regarding the *onus probandi* might have availed him if there had not been a separation.

As ghatwals do not pay so much per beegah to Government, it is impossible for it to prove that it has actually and directly received rents for any particular portion of the lands in dispute. When, with regard to these cultivated lands claimed by the plaintiff, the defendants plead limitation, I do not see why they should be required to prove that these lands have been held by the ghatwals, and also prove that the Government has received rents for these identical lands. The fact that Government receives revenue from the zemindar does not alter the nature of the case, or shift the *onus*. The plaintiff in this case, like any other plaintiff, was bound to show that these cultivated lands were held by him within twelve years preceding his suit. On the contrary, he admits that, for more than twelve years from the time that he acquired the right under which he sues, he has never held them; and so, with regard to this portion of the lands claimed by him, his claim appears to me barred by the Statute of Limitation.

I do not object to a remand regarding any portion of the lands claimed that may be admitted by both parties or proved by evidence to be uncultivated.

Although the ghatwals may perhaps succeed in proving some sort of possession even of these lands, yet as, from the very

nature and quality of these lands, such possession cannot necessarily be considered as adverse, it is not at all advisable to apply any limitation to the claim of the plaintiff regarding such lands.

It would, however, be necessary to remand in order to find out the two kinds of lands if their respective quantity and identity are not admitted or already proved.

Loch, J.—With regard to the jungle lands, I see no objection to a further investigation being made as proposed by my colleagues: because it is very difficult to prove possession of such tracts unless the proprietor have exercised acts of ownership by preserving and appropriating the jungle for his own use, or permitting others to appropriate certain portions, paying him for the same. The mere assertions of possession or demarcation in a map are not of themselves proof of possession.

With regard to the cultivated lands, however, I do not see why the Law of Limitation cannot be pleaded by the defendants in this case as in any other, where the complainant admits that he has been out of actual possession for more than twelve years.

The ghatwallee lands of Bishenpore were originally comprised within the zemindary of that name. At the instance of Government they were separated from that zemindary, and Government took possession of an area nominally aggregating 35,955 beegahs, assessed at 4,641 rupees. These lands had never been measured, and the area in possession of the ghatwals was known to be much larger than stated, and the first returns of the ghatwallee lands received through the Police Officers shewed that the lands in the occupancy of the ghatwals as ghatwallee tenures greatly exceeded the area mentioned in the instrument by which they were transferred to Government by the Rajah of Bishenpore, to whom a remission of revenue from the jumma of Pergunnah Bishenpore was allowed.

When the ghatwallee lands were transferred to Government, they were entered as a separate mehal in the rent-roll of the district, and did, in fact, constitute a separate estate therein. The ghatwals hold their lands direct from Government in return for their services as Police, paying also a small quit-rent. They stand very much in the position of talookdars under a zemindar, paying, however, in return for the lands they hold, not a full money-rent, but a rent consisting partly of service and partly of money. It appears to me that the position of Government as proprietor of the ghatwallee mehal is that of an independent zemindar, deriving no title from the zemindar of Bishenpore, but as completely separate from him and his zemindary, as if Government had acquired the lands by gift or purchase, or by any other independent mode. Now, if a talookdar, paying a fixed jumma to his zemindar, encroach upon the property of a neighbouring zemindar, he pays no increase of rent to his own landlord for lands so acquired; and, if the injured zemindar sleep over his rights, and do not seek to recover possession within the period allowed by law, the talookdar and his zemindar may effectually plead the Law of Limitation against him. Why should the same rule not be applied to the case of these ghatwals? If a ghatwal trespass, the party injured is bound to take steps to remedy the injury in proper time. If he sleep over his rights, why should he not lose his remedy as in other cases? The conduct of the ghatwal may be reprehensible in appropriating the property of another, but it is no worse than that of the talookdar, whom I have supposed under similar circumstances; and, if the talookdar and his zemindar could plead limitation as against a party seeking to recover possession, why should not the ghatwal and Government, his zemindar, be able to take the same plea? It is true that Government is unable to show that it has received rents for the lands alleged to have been encroached upon, and thus exercised acts of ownership over them; but a zemindar, whose dependant talookdar encroaches on the neighbouring zemindar's lands, is equally unable to show this, and therefore this test is equally defective in his case; and yet in the latter case, if the injured party sleep over his rights, he loses his remedy.

In the present case, we find that plaintiff purchased the putnee in 1839. He admits that, in regard to these cultivated lands, he has never received rents from the ghatwals who hold them rightly or wrongly as part of their ghatwallee tenure. In fact, he admits that he has exercised no rights of ownership over them for more than twelve years. He alleges that his predecessor did collect rents from the ghatwals which they ceased to pay on his purchase of the putnee. Why did he sleep over his rights if they ever were in existence?

It may be said, however, that this is not a suit for possession. The form of the suit matters very little, except to show the ingenuity of the party bringing

it. In substance it is to recover possession, but, instead of bringing his action for possession and mesne-profits as against wrong-doers, plaintiff assumes that the lands are his, and the defendant ghatwals recusant occupants, and therefore he brings his action to assess their tenures. Had the suit been brought in its present form against an ordinary zemindar, the Law of Limitation could have been as effectually pleaded as if the suit had been to recover possession; and, as plaintiff by his pleading shows that he has been out of possession for more than twelve years, his suit would have been held to be barred. In what respect is Government, holding the ghatwalee tenures in its own right as zemindar, in a different position from an ordinary zemindar? Government, it appears to me, as zemindar, has all the rights and privileges of an ordinary zemindar, and the laws applicable to suits brought against the latter are equally applicable to suits against the former. The present suit brought for assessment is simply an attempt to evade the Law of Limitation, and, if effectual now, may be used in all cases. I would, therefore, confirm so much of the order of the Judge as relates to the cultivated lands.

Trevor, J.—The question before us in this case is a simple one, *viz.*, whether the Statute of Limitation bars the claim on the plaintiff's own statement of his case or not.

Plaintiff represents that he purchased in 1246, or 1839, at a sale for arrears of rent under Regulation VIII. of 1819, the putnee talook Lot Kotriah, in which the lands now sued for lie; that the lands in suit are partly cultivated and partly under jungle; that for the cultivated portions the ghatwal in possession had paid rent to his predecessor; that they fraudulently refused to pay them to him, alleging that they were included within the ghatwallee lands for which they paid a quit-rent to Government; that in 1802 a certain portion of his talook, consisting of 35,955 beegahs held by the ghatwals bearing a jumma of Sicca Rupees 4,641, was, by arrangement with Government, made over to Government, and constituted a separate estate on the rent-roll of the district; that the ghatwals have from time to time encroached upon his estate; and that their possession of the 1,362 beegahs in dispute is an encroachment of that nature, inasmuch as the area is not within the land made over to Government in 1802; that the Deputy Collector in the Survey Department has lately demarcated them as belonging to the ghatwallee estate, and they, therefore, sue for the reversal of the survey order and for the declaration of their right to the same.

The ghatwals plead limitation, alleging that the land is their ghatwallee land for which they have always paid quit-rent to Government as ghatwals, and the Government pleads the same.

Had all the lands been under cultivation, and the zemindar in possession, or had Government pleaded that it had by the receipt of rents exercised the right of ownership continuously over the whole of it, this possession being adverse to the plaintiff, it would have been for the plaintiff to show that he had been in possession within twelve years prior to the date of suit, and, failing on this point, his suit must have been dismissed. But such is not the state of the present case. The Government pleader admits that the land in dispute is partly cultivated and partly jungle, and that he gets a quit-rent from the ghatwals for a large quantity of land; and that he is unable to say whether this is portion of the land on which the quit-rent was fixed or not, that is, he is unable positively to assert an adverse possession to the defendant. Now, as regards the uncultivated land, there seems to me to be no doubt that there was no possession accompanied by an exercise of the right of ownership in any one, either in the plaintiff or in Government; the ghatwal's possession alone is not adverse to the plaintiff, they being under-tenants. It follows that, for this portion of the claim, the case must unquestionably be remitted for re-investigation as to whether the uncultivated land formed portion of the lands made over to the Government in 1802, or not? If it did, the plaintiff's suit must be dismissed; whereas, if it did not, he must obtain a decree.

Again, as to the cultivated lands, as Government is unable to assert that these lands are those on which quit-rents of the ghatwals were fixed, and consequently those on which it has continuously exercised the right of ownership, the mere fact of the ghatwals having taken possession of and cultivated them cannot, by limitation, bar the right of either zemindar. In this state of things, it seems to me that no application of the Statute of Limitation on the pleadings can be made; but this portion of the case, as well as that regarding the uncultivated lands, must be tried upon its merits, the real issue being, are the cultivated lands in dispute within the estate of plaintiff, or the ghatwallee estate of Government, as settled

in 1802? The plaintiff alleges that his predecessor in the putnee always collected rents from these lands; if he is by evidence able to prove this, it will go far to establish his title to them, as on the part of Government it is not asserted that these particular lands have ever been subjected by it to assessment.

On the view of the case expressed above, the whole case should, in my judgment, be remitted for enquiry on its merits in the mode above suggested.

In consequence of the death of Mr. Justice Levinge, the case was heard by the Chief Justice (Sir Barnes Peacock), by whom it was again referred to a Full Bench with the following order:—

Peacock, C. J.—But for the opinion of the two learned Judges (Mr. Justice Trevor and Mr. Justice Norman) I should have entertained no doubt or difficulty on the subject of this case. As to the cultivated lands, those learned Judges differ from Mr. Justice Loch and Mr. Justice Shumbhoonath Pundit. It appears to me that the decision of the 18th June 1860, which was passed by Mr. Justice Loch and Mr. Justice Bayley, is perfectly correct; and, following that decision and the principle on which cases of this sort ought to be determined, it appears to me, if I can legally express an opinion upon the subject, that the decision of Mr. Justice Loch and Mr. Justice Shumbhoonath Pundit, as to the cultivated lands, is correct. But I unfortunately differ with those two learned Judges with regard to the uncultivated lands, because it appears to me that there may be a possession of uncultivated lands or jungle, just as much as of cultivated lands. Take the instance of a Tea Garden in Cachar or Assam. There is no doubt that persons have bought land from Government for Tea Gardens, who are in possession of the whole, notwithstanding large portions are jungle and wholly uncultivated. There may be great difficulty in proving the possession of uncultivated lands; and, if there is any doubt as to who is in possession, the case would probably be determined in favor of the party who proves title. But if one party can prove that he has been in adverse possession of uncultivated lands for a sufficiently long time to bar the remedy of the person who has title, the case of the latter may be barred by limitation, as to uncultivated land or jungle, in the same manner and to the same extent as regards cultivated lands. Mr. Justice Loch says that it is very difficult to prove the possession of uncultivated lands, and Mr. Justice Pundit is of the same opinion. But, although such a difficulty may exist, it does not follow that it is insurmountable. Therefore, if I could express an opinion as to whether the case should be remanded, I should remand it, if at all, as to the uncultivated lands, to try first whether the ghatwals had or had not had adverse possession of the uncultivated lands for a period exceeding twelve years before the commencement of the suit; and should hold that, if the possession by the ghatwals for twelve years before the institution of the suit should be established, the plaintiff would be barred with regard to the uncultivated lands just as much as with regard to the cultivated lands. If neither party should be proved to have had actual possession, or to have exercised rights such as would amount to possession, or from which possession might be inferred, the question of title would have to be gone into. This would be the case if the cause were remanded for re-trial of the uncultivated lands; but I am not sure that it will not turn out that the Lower Courts have found as a fact that the ghatwals were in possession of the uncultivated lands. This question, however, I cannot enter into as a fifth Judge, the four other Judges not differing as to the uncultivated lands. If I were to give judgment as to the cultivated lands, and an application for a review of judgment were to be presented as to the uncultivated lands, as the pleader for Government has proposed, I could not express an opinion on that matter, because I should be no party to the judgment as to the uncultivated lands; as to those lands the judgment would be that of the four Judges alone. But, upon looking at Section 23 of Act XXIII. of 1861, I doubt whether I have power to express an opinion at all in the case. That Section enacts as follows: "If, when the Court consist of "only two Judges, there is a difference of "opinion upon the evidence in cases in "which it is competent to the Court to go "into the evidence, and one Judge concur "in opinion with the Lower Court as to the "facts, the case shall be determined accordingly; if in a Court so constituted" (that is, a Court composed of two Judges) "there "is a difference of opinion upon a point of "law, the Judges shall state the point upon "which they differ, and the case shall be "re-argued upon that question before one or "more of the other Judges, and shall be

"determined according to the opinion of the "majority of the Judges of the Sudder "Court by whom the appeal is heard." The Court by whom this appeal was heard was not a Court consisting of only two Judges. It was a Court consisting of five, who, if one of them had not unfortunately died, would have considered and passed their judgment on all the points brought forward. Mr. Justice Levinge might have expressed an opinion as to the uncultivated lands which I cannot. I therefore do not stand in the same position as he did. It is not a mere technical objection, because, when the Judges take time to consider and consult together, it is possible that the opinion and arguments of one Judge might to some extent influence the opinion of another Judge. It might have been that Mr. Justice Levinge might have convinced Mr. Justice Loch and Mr. Justice Shumbhoonath Pundit that, although there might be great difficulty in proving possession of uncultivated lands, the case should not necessarily be remanded to try the question of title until the question of possession had been first determined, or that the fact of possession of the uncultivated lands had been decided by the Lower Courts, and was not open to be reversed on special appeal. When the case came before me to refer it to a fifth Judge in consequence of the death of Mr. Justice Levinge, I thought that that would be the proper course. It did not occur to me then that I should not be in precisely the same position as that learned Judge, and to point out in consultation and express my views on some points of the case upon which there was no difference of opinion amongst the other four Judges. But, upon further consideration, it appears to me that this is not a case within Section 23 of Act XXIII. of 1861, and that the case ought to be re-argued before five Judges, of whom I will form one. I think that the other four Judges ought to be the four who heard the case before.

Therefore, without expressing any decided opinion on the points upon which the learned Judges either differed or agreed, because my mind is open to be influenced upon further argument at the bar, or by the opinions and arguments of my learned brothers, I merely decide that this is not a case for a single Judge under Section 23 of Act XXIII. of 1861, and that it must be re-heard before a Full Bench of five Judges. I will arrange and fix an early day for the re-hearing of the case before the Judges as above stated. I am very sorry that the mistake should have occurred, and that the learned Counsel should have had the trouble to re-argue the case fruitlessly.

The case was accordingly re-heard before a Full Bench, when the following judgments were delivered:—

Peacock, C. J.—There are two questions in this case, *1st:* As to the cultivated lands of which it is admitted the defendants were in possession; and, *secondly*, as to the uncultivated lands.

It appears that the ghatwallee lands were originally part of the zemindary of Bishenpore, and for some reasons (as to which it is not necessary now to enquire) a portion of the lands was given up by the zemindars to the Government, and the Government gave up a portion of the revenue assessed on the zemindary.

Upon a survey of the lands which are now in dispute, both the cultivated and uncultivated lands were included as belonging to the Government, and in the possession of the ghatwals. The owners of the putnee of Bishenpore claim to set aside that survey, and to declare that they were entitled to the lands both cultivated and uncultivated. They admit that, as to the uncultivated lands, they have never been in possession, or in the receipt of any rent since the year 1839, when they became purchasers of the putnee under a sale for arrears. But they say that from that time the defendants (the ghatwals) fraudulently or dishonestly refused to pay them rent as they did to their predecessors. The defendants say that they never paid any rent for the land to the putneedar of Bishenpore; that that allegation is not true; that they hold now, and have held these lands since 1839, without paying any other than the quit-rent which they paid to Government. It is an important question (as regards not only the Government, but as regards the ghatwals also) whether, in respect of lands which the defendants claim to have held as part of their ghatwalee tenure, they are now to be called upon to pay, in addition to the quit-rent, a rent to the putneedar, on the ground that they are a portion of the lands of the putnee of Bishenpore. If the plaintiffs can make out that the ghatwals did pay rent to their predecessors, such payment as against the ghatwals would be evidence that the lands in respect of which the payment was made was part of the putnee of Bishenpore. But the ghatwals could not legally transfer the right to the lands, if they really were part of

the ghatwallee estate, from the Government to the putneedar paying rent to the putneedar of Bishenpore in addition to the quit-rent. Therefore, as regards the ghatwals, it is necessary to enquire whether they did or did not pay rent to the putneedar prior to 1839. If they did, such payment as regards the ghatwals would be evidence in favor of the owners of Bishenpore. But, as against the Government, the mere fact of paying the owners of Bishenpore would not be sufficient. The *first issue* that ought to be tried as to the cultivated lands is, whether the defendants (ghatwals) or those under whom they claim paid rent for any and what part of the cultivated lands to the predecessors of the plaintiff; and, next, whether the cultivated and uncultivated lands or any and what part of them formed part of the putnee of Bishenpore.

Then, as to the uncultivated lands, it is said that the defendants were not in possession. But the survey shows that they are in possession, and that those lands are part of the ghatwallee lands; and, the action being brought to set aside the award made in that survey, there is a *primâ facie* case in the defendants' favor that they were in possession of those lands. Now, although it may be difficult in many instances to prove the actual possession of jungle lands, it is possible to do so. The civil law requires different kinds of proof according to the nature and quality of the things to be possessed. It is laid down as follows in Domat's Civil Law:—

Page 846, para. 2130.

"One may possess corporeal things whether "they be moveable or "immoveable; but, ac-"cording to the differ-"ences of their nature, the marks of the "possession of them are different. Thus, "one may possess moveables, by keeping "them under lock and key, or having them "otherwise at one's disposal; thus, one "possesses cattle, either by shutting them "up, or giving them to be kept; thus, one "possesses a house by dwelling in it, or "having the keys thereof, or trusting it "to a tenant, or by building in it; thus, "one possesses lands by cultivating them, "reaping the fruits, going or coming "through them, or disposing thereof at "pleasure."

The marks of possession, therefore, with regard to property depends on the nature of the property. It is not necessary, in order to prove possession, to prove an actual bodily continuous possession.

Page 847, para. 2132.

Domat says: "Although possession im-"plies the detention o-"what we possess, ye-"this detention ough-"not to be so understood as if it were ne-"cessary to have always, either in our han-"or in our sight, things of which we hav-"the possession. But, after possession ha-"been once acquired, it is preserved witho-"an actual possession."

The exercise of such acts of ownersh-over jungle lands as would ordinarily b-exercised over property of that nature wou-be evidence of possession. For instance, it were proved that the ghatwals were i-the habit of cutting or preserving the wo-gathering wax or wild honey, collecting stic-lac, &c., may all be evidence of acts o-ownership or possession; and those w-have to deal with the facts of the case mu-determine whether the acts were referab-to the right of property or possession, or ac-of mere right or easement independent o-possession. As, therefore, there may b-possession of uncultivated land, as well a-of cultivated land, the question must be trie-whether the defendants were in possessio-of the uncultivated lands from the year 183-or for a period exceeding twelve yea-next before the commencement of this su-and if they had possession of the uncultiva-lands or of any portion of them whethe-they ever paid rent for them to the plaint-or his predecessors.

I think these are the only issues which-will be necessary to try for the purpose o-coming to a correct conclusion as to th-final decision of this case. But, as the-questions of fact may be difficult to be dea-with upon the evidence, I think it will b-well to direct the Judge to take the case o-to his own file, so that, in case of necessit-it may come up to this Court as a regul-appeal, and be heard and determined as we-on the questions of fact as the questions o-law.

The issues are as follow:—

1st. Whether the defendants (ghatwals-or those under whom they claim, paid ren-for any and what part of the cultivated lan-to the plaintiff or his predecessors of th-putnee estate?

2nd. Whether the cultivated or uncult-vated lands claimed, or any and what part o-them, formed part of the putnee estate of th-plaintiff?

3rd. Whether the defendants ghatwal-were in possession of the uncultiv-ed land-or of any and what part of them from th-

ear 1839, or for a period exceeding twelve ears before the commencement of this suit?

4th. Whether they paid rent for the same, r for any and what part of them, to the aintiff or the owner of the putnee estate?

I should add that a tenant cannot prescribe ainst his landlord according to the English w or the civil law, nor, as I understand, cording to the law as laid down in the ulder Decisions.

Trevor, J.—When this case was last be- re the Court, I put in a written judgment, d I see no reason to alter the opinion rein expressed. It appears to me that e case should be referred to the Lower ourt for enquiry on only one point, *viz.*, ith whom is the title to the lands in dis- ute—is it with the plaintiff or the defend- ts? The only party who could plead an verse possession to the plaintiff is the overnment. But it has never set up adverse possession, and the mere fact of e ghatwals having been in possession as nants cannot entitle them to do so. Such ing the case, in my opinion, the only point r enquiry is, as I have above stated, with hom is the title—with the plaintiff or the efendant; and I would send the case back r that purpose only.

Lack, J.—I still adhere to my former inion. I think the suit is barred by limit- ion. The plea set up by the defendants, d taken together by the zemindar and the atwal, is a valid plea; and, as the plaintiff mits that, as regards the cultivated lands, he s exercised no rights of ownership for more an twelve years, he cannot bring his action recover.

With regard to the uncultivated land, how- er, there is not the same admission made; d, therefore, I think the case may go back ain for the question of possession to be tried as proposed by the learned Chief tice. If plaintiff's possession within elve years be proved, it will go far to ove his title.

Norman, J.—I adhere to the opinion I iginally expressed in this case. With ference to the arguments which have ce taken place, it is necessary to add at, when the case was before the Court on e last hearing, Baboo Kishen Kishore hose admitted that the Government had t received rent specifically for these lands om the ghatwals, defendants, who were in ossession. For the purpose of the plea of mitation, it must be assumed that these nds are within the limits of the decennially ought estate of Bishenpore. I think that, when a person holds lands within a zemindary, but not under a zemindary title, in order to sustain the plea of limitation against the zemindar suing to assess, he must show a possession adverse to that of the zemindar. If he is a mere ryot, his possession is not adverse. Again, as a mere squatter, he cannot plead limitation. If the plea of limitation could be pleaded successfully, it would be on the ground that from a twelve years' possession it could be inferred that a rent-free tenure has been created within the zemindary. But such a grant, if actually made, would be invalid, and, as it appears to me, contrary to Section 10 of Regulation XIX. of 1793. That, I believe, is the true ground of the decisions in cases like Sheikh Shafaetoollah *versus* Joy Kishen Mookerjee, 7 Select Reports, p. 499, and in the S. D. A. Rep., 1850, p. 188, that the general Law of Limitation is inapplicable to the case of a person who proceeeds to assess rent against another holding under an alleged invalid rent-free tenure.

In that case, and in Degumber Mitter's case, it is said that the cause of action was a perpetually recurring one. I think that principle applies to the persons who are now found occupying lands within the zemindary of Bishenpore. They themselves could not plead limitation in a suit to assess and declare the land to be *mal* lands. I think it makes no difference that they are holding adjacent lands under the Government. They say that the lands are within a zemindary belonging to the Government. Are they or are they not? That is a simple issue. It may be, as a general rule, that encroachments are to belong to the estate of the landlord under whom the encroaching tenant holds. But that is a presumption capable of being rebutted. It is by no means clear that there is such a presumption in favor of the landlord as against a stranger. Lord Campbell, in Doe dem Baddeley *versus* Massey, 17 Q. B. 376, says: "The prin- "ciple must be that the lessee is stopped "from denying that the whole premises are "those which were demised to him. It "would be strange to say that the tenant "steals for the benefit of his landlord." If it be said that the land was taken in for the landlord's benefit, "the landlord is thereby "entitled as against the tenant who took, but "not against a third person." The zemindar of Bishenpore being liable to the payment of Government revenue in respect of these lands, it is exactly the same as if a contract existed with the Government. It appears to

me that the Government cannot be in the position of being entitled to claim the Government revenue, and at the same time to plead adverse possession as against the zemindar in respect of these lands.

I am, therefore, prepared to say that the Government cannot set up an adverse possession. It is clear that the Government never did, in fact, assert any adverse title by taking rent for, or specifically asserting a claim to, those lands as against the zemindar. Had the Government actually asserted an adverse title to the lands as being part of the ghatwallee lands more than twelve years ago, the question would have been different.

As to the *first issue* proposed by the learned Chief Justice (namely, whether the ghatwals, or those under whom they claim, paid rent for the cultivated lands to the plaintiffs or their predecessors), I see no objection to it, and if that issue is found in favor of the plaintiffs, and it is shown that the ghatwals ever paid rent to the now plaintiffs or their predecessors, they cannot convert what was once a tenancy into an adverse possession.

Nor have I any objection to the *second issue*, whether the cultivated and uncultivated lands ever formed part of the plaintiff's putnee estate.

The *third* and *fourth issues*, whether the defendants were in possession of the uncultivated lands for more than twelve years before suit, and whether they ever paid rent for the same to the putneedar, are material; because, if found against the defendant, they dispose of the case, even if the views I have enunciated are not adopted by the majority of the Court.

Shumbhoonath Pundit, J.—The ghatwals hold a separate estate so long as it is not proved that they were the ryots of the plaintiff or of his predecessor; they have a right to plead adverse possession and limitation against the plaintiff. That the ghatwals were originally allowed to hold as ghatwals lands in quantity less than they are now holding would not alter the position of things, or affect the rights of the defendants.

When the ghatwals pay only a quit-rent in a lump sum for the ghatwallee estate, Government may, without any prejudice to the rights of the ghatwals, say that it cannot declare that for any particular parcel we get or do not get the quit-rents. Whether the lands in dispute are parts of the original ghatwallee tenure, or represent the encroachments of the ghatwals upon the zemindary lands, it does not alter the state of things. Government can hold adversely to the plaintiff through the ghatwals if they have held the lands in dispute *as ghatwals*. As regards the cultivated lands, plaintiff admits that he has not received any rents for them since his purchase, and so to prove anything on this point favorable to the plaintiff, the *onus* is upon him. As to the uncultivated portion, if the defendant likes to plead the adverse possession of a property which may be legally held by plaintiff without the exercise of many ordinary proprietary rights, the defendants must prove that their alleged possession of these lands is such as can legally and reasonably be called adverse to the plaintiff.

I have no objection to an order of remand, directing that for lands cultivated more than twelve years ago, if the plaintiff likes, he may prove that his predecessor had received rent from the defendants now in possession or their predecessors; and, if he can prove that, then those who held once as tenants cannot be allowed to hold for themselves or others adverse to their former landlord. It may also be directed that, with regard to lands brought into cultivation within twelve years, there would not be any question of limitation. As to the uncultivated lands, if the *defendants* can prove that they have held possession of these in such a manner as to make their holding actually adverse to the plaintiff, then limitation will apply to the claim for this portion. If for both or any portion of them limitation does not apply, then for the same the title of the plaintiff is to be enquired. The case is to go to the Zillah Judge, and not the Principal Sudder Ameen, that the decision arrived at by the Lower Court may be appealable to this Court as a regular appeal.

The 15th June 1864.

Present:

The Hon'ble *Sir* Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, J. P. Norman, and Shumbhoonath Pundit, *Judges*.

Minors—Jurisdiction of Court of Wards (not affected by Act XL. of 1858).

Case No. 466 of 1865.

Special Appeal from a decision passed by Mr. C. Hobhouse, Judge of Midnapore, dated the 21st December 1864, affirming a decision passed by Baboo Obhoy Coomar Dutt Roy Bahadoor,

Principal Sudder Ameen of that District, dated the 27th September 1864.

Modhoosoodun Singh (Plaintiff), *Appellant,*

versus

The Collector of Midnapore and Messrs. R. Watson and Co. (Defendants), *Respondents.*

Baboos Ashootosh Dhur and *Chunder Madhub Ghose* for Appellant.

Baboo Kishen Kishore Ghose and *Messrs. R. T. Allan* and *J. S. Rochfort* for Respondents.

The Court of Wards is not prevented by Act XL. of 1858 from taking a minor and his estate under their protection by reason of a certificate of administration granted by the Civil Court under that Act.

This case was referred to a Full Bench with the following order :—

Morgan and *Shumbhoonath Pundit, JJ.*—This appeal was heard by us a few days ago, when it appeared that the question for decision (which is whether the Court of Wards may *at any time* claim the guardianship of a minor and the management of his property, notwithstanding that a Civil Court guardian under Act XL. of 1858 has been appointed) had formerly been before a Division Court, who had so dealt with it that, without expressly deciding the point, they had apparently intimated an opinion in the Collector's favor.

The question is a very important one, and if, under the power reserved to the High Court by the 13th Section of the Statute 24 and 25 Vic., Chapter 104, a Division Court of more than two Judges can be constituted to hear and dispose of it, it seems to us that such a Court should be constituted for the purpose.

The case was accordingly heard before a Full Bench, when the following judgments were delivered :—

Peacock, C. J.—We are of opinion that the Court of Wards was not prevented by Act XL. of 1858 from taking an infant and his estate under their protection by reason of a certificate of administration granted by the Civil Court under Act XL. of 1858. Before the passing of Regulation VI. of 1822, it seems that it was considered under the old Regulations to be the duty of the Court of Wards to take the protection in all cases in which they had the legal power to do so. Regulation VI. of 1822 was passed partly for the purpose of authorizing the Court of Wards to refrain from taking the estate of an infant under their protection. In the preamble of that Regulation it is said: "It is moreover expedient to enable "the Courts of Wards to refrain from inter-"fering with the estates of minors or other "disqualified proprietors in cases wherein "they deem their interposition unnecessary or "inexpedient." Section 4 then enacts as follows: "The several Courts of Wards "are hereby vested with a discretion to re-"frain from interfering with the estates of "minors or other disqualified proprietors in "cases wherein they may deem their inter-"position unnecessary or inexpedient." And in the latter part of the Section it is said: "And it will, of course, be competent "to the Courts of Wards to assume charge of "such estates at any time during the minor-"ity of the proprietors, notwithstanding they "may have originally refrained from inter-"fering." So that, as the law stood under that Regulation, the Court of Wards might refrain from taking an infant and his estate under their protection, but were competent at any time to assume charge of the estate. Then, was it the intention of Act XL. of 1858 to deprive the Court of Wards of the power which they had under the Regulation above referred to? Section 2 of the Act says: "Except in the case of proprietors of estates "paying revenue to Government, who have "been or shall be taken under the pro-"tection of the Court of Wards, the "case of the persons of all minors (not "being European British subjects) and the "charge of their property shall be subject "to the jurisdiction of the Civil Court." The exception extends to cases of proprietors of estates paying revenue to Government, which shall be taken under the Court of Wards. The Act does not deprive the Court of Wards of their right to assume charge, notwithstanding they may have originally refrained from acting.

We are of opinion that the Court of Wards had the power to assume jurisdiction, notwithstanding the Judge had granted a certificate of administration under the Act. There a person made an application for a certificate under the Act, and the application was granted. The next of kin asked that he might be removed. The Judge removed the manager, and ordered the estate to be taken under the authority of the Collector. There was no

necessity for the Court of Wards to interfere, because, directly the Judge removed the manager, he put the estate under the Collector. But on the 8th January 1863 an appeal, which had been preferred from that order, was decreed, and the Collector was removed from possession. Then, if the Court of Wards thought it right to assume charge, there was no necessity for their having the next of kin to institute and incur the expense of a regular Civil suit for the purpose of removing the manager. The Court of Wards, when they saw that the manager had been removed by the Judge at the instance of the next of kin, thought fit to prevent the estate from incurring the expense of fresh litigation, and assumed the jurisdiction which they had. It appears to me that they did perfectly right. The decree of the Lower Appellate Court must be affirmed with costs.

Trevor, J.—I entirely concur with the learned Chief Justice. I think, upon the point referred to us, that the Court of Wards had a perfect legal power to assume charge of this estate, and Act XL. of 1858 does not in any way affect the jurisdiction of the Court of Wards.

Loch, J.—I concur.

Norman, J.—I agree entirely on the point of law. I find, on referring to the reported decision of 8th January 1863, that it is quite clear that, though there were grave charges against the manager not fully substantiated, the management by the manager was admittedly far less advantageous to the infant than the management by the Collector. It appears to me that the Court of Wards representing the Sovereign as *parens patriæ* for the protection of the interests of the infant, and for the security of the public revenue, were right in assuming the charge of this estate.

Shumbhoonath Pundit, J.—I agree in the judgment of the learned Chief Justice, on the ground that the powers of the Court of Wards do not appear to have been taken away by any enactment, and that the Act of 1858, giving the power to the Civil Court, does not contain any provision that, on the Civil Court acting, the right of the Court of Wards to assume jurisdiction shall cease.

The 17th June 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Ghatwals of Kurrukpore (Eviction of)—Mokurruree istemraree holding (Definition of).

Case No. 299 of 1864.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 21st June 1864.

Munrunjun Singh and others (Defendants), *Appellants,*

versus

Rajah Lelanund Singh and others (Plaintiffs), *Respondents.*

Mr. W. A. Montriou and *Baboo Chunder Madhub Ghose* for Appellants.

Messrs. R. V. Doyne and *G. C. Paul,* and *Baboos Dwarkanath Mitter* and *Unnoda Pershad Banerjee* for Respondents.

The ghatwals of Kurrukpore hold a perpetual hereditary tenure at a fixed jumma payable in money and service, and cannot be evicted by the zemindar except for misconduct.

A "mokurruree istemraree" holding is a perpetual holding at a fixed jumma.

THIS is a suit by the Zemindar of Kurrukpore, in Zillah Bhaugulpore, claiming possession of Talooka Khukwara, comprising a number of villages, hitherto held by the defendants on a "*ghatwallee*" tenure.

Plaintiff alleges that the lands were held for certain police services; that the appointment and dismissal of ghatwals rested with him; that he has lately compounded with Government for a money payment in lieu of the police services which he was bound to render through the ghatwals; and that, therefore, those services being no longer required, he is entitled to resume the lands.

The defendants reply that they are not lessees liable to ejectment, but hold a permanent tenure of the character known as "ghatwallee;" that it existed long before the Permanent Settlement, being held at a fixed jumma as set forth in sunnuds derived directly from the representatives of the British Government, and in compensation for service in guarding the mountainous country and passes, which service they have performed, are performing, and are able and willing to continue to perform.

Defendants, in support of this case, file a sunnud of 17th September 1777, given to them by Captain Brown, a British Officer, who seems to have held office of Superintendent of the Forest Tracts in those parts, and perhaps dealt directly with the tenants under the zemindar during a suspension of the latter from office, such as was common in those days, and certainly occurred on another occasion when Mr. Cleveland so acted in charge of the zemindary. The genuineness of this sunnud is not proved by direct evidence, nor is the extent of Captain Brown's authority shown; but we see no reason to doubt that the sunnud is genuine, supported, as it is, by the terms of the subsequent sunnud about to be mentioned; and whatever Captain Brown's powers (which we must presume to have been properly exercised), the document is the strongest evidence to show the then *status* and character of the tenure. It is addressed to the ancestors of the defendants in the character of ghatwals, and seems to us to be rather a confirmation of an existing tenure than the creation of a new one. It describes the tenure as a "mokurruree istemraree" holding, or perpetual holding at a fixed jumma—the word 'istemraree,' we think, referring to perpetuity in point of time, the word 'mokurruree' to fixity in respect of jumma. The jumma is stated to be rupees 245, besides *rasoom akrajat*, &c. The conditions of service are not specifically set forth, general terms only being used. That the tenure was at the Permanent Settlement included in the zemindary of Kurrukpore, and that the jumma is payable to the zemindar, there is no doubt. And about the time of the Settlement we have the sunnud of the zemindar Rajah Kadir Allee certainly genuine, and which is the strongest evidence of the *status* of the defendants at the time of the Settlement. For it recites that the ghatwals held under previous sunnud, and confirms them in their holding according to previous *custom*. It specifies 172 burkundazes as the force which the ghatwals are bound to keep ready, details the fixed jummas to be *mal*, rupees 215 3 0

Zemindary *rasoom* ...	30	12	0
Total Rupees ...	245	15	0

and it gives a detail of the villages included in the holding. The only discrepancy between this and Captain Brown's sunnud is that the latter described the jumma as rupees 245 besides *rasoom*, while Kadir Allee's specifically includes the *rasoom* in the rupees 245; but no detail being given in captain Brown's sunnud, a mistake in a single word may easily have occurred.

On these terms the defendants' ancestors and themselves have continued to hold down to the present time in common with many other ghatwals holding on a similar tenure.

Some years ago the Bengal Government attempted to resume and assess the ghatwallee lands of the Kurrukpore zemindary, on the ground that they were mere "police chakeran" tenures, or lands held for support of the ordinary police establishment of the country, and which (the zemindars having been released from police duties) the Government might properly resume and assess under Regulation I. of 1793, Section 8, Clause 4. The result of that litigation was the decision of the Privy Council of 25th July 1855, by which it was determined that the ghatwallee tenures of Kurrukpore were not chakeran lands held for ordinary police service, and that the Government had no power to resume or assess them, since they were included in the decennially settled estate of the Rajah. The Government seems to have subsequently called on the zemindar to furnish the service of the ghatwals on which the lands were held. But eventually a compromise was effected between the Government and the zemindar, to which the ghatwals were no party, by which the zemindar engaged to pay a certain annual sum (10,000 rupees, in addition to the former jumma of the estate) in lieu of those services; and the Government undertook to perform the service through their own paid servants, releasing the zemindar from all liability on the score. In consequence of this arrangement, the zemindar, considering that he has no further occasion for the services of the ghatwals, has brought suits to oust them altogether from the lands held by them, and this is the first of those suits which has come before us.

In the present case the Principal Sudder Ameen has decreed plaintiff's claim, on the ground that "since the original police service was undertaken by Government, it is a fact that the police service pleaded by defendants became abolished." And—"It is manifest that no service or employment can be forced by the servant or employer upon any person. On the contrary, servants or jagheerdars holding their tenure on condition of performing some special duty, can, at any time, be removed; no length of service would be of any avail to them."

Consequently, the defendants appeal, and the case has been very fully argued by Counsel on both sides. It appears that there is considerable variety in the tenures known under the general name of ghatwallee in different parts of the country. They all agree in this that they are grants of land situated on the edge of the hilly country, and held on condition of guarding the ghats or passes. Generally, there seems to be a small quit-rent payable to the zemindar in addition to the service rendered, and with the view of marking the subordination of the tenure. But in some zemindaries and putnees these tenures are of a major, in others of a minor, character. Sometimes the tenure of the great zemindar himself seems to have been originally of this character. More frequently large tenures, consisting of several whole villages, are held under the zemindar. And in other places, *e. g.*, in Bishenpore, as explained by Harington (Analysis, Volume III., page 510), the sirdar and superior ghatwals have small and specific portions of land in different villages assigned for their maintenance. These last, says Harington, are of a nature analogous to the chakeran assignments of land to village watchmen in other districts. But he goes on to explain that the ghatwallee tenure differed essentially from the common chakeran in two respects: *first*, that the land is not liable to resumption at the discretion of the landholder, nor the assessment to be raised beyond the established rule; and, *secondly*, that, although the grant is not expressly hereditary, and the ghatwal is removeable for misconduct, it is the general usage, on the death of a faithful ghatwal, to appoint his son, if competent, or some other fit person in his family, to succeed to the office.

These inferior ghatwallees seem to be those in which the zemindar or ruling power deals direct with the individuals who do the work, assigning them pieces of land in the established villages. The larger tenures were more of the nature of semi-military colonies, where a chief with his followers were settled down in parts of the country so unsafe that it could not be otherwise occupied. It seems to have sometimes happened that when the country, liable to be harried and plundered by freebooters from the hills, was almost entirely reduced to jungle and desolation, one of these semi-military colonies was settled down under a grant to the chief of such character as that recited in this case. And, not unfrequently, Afghans, Rajpoots, and others came from a distance on those terms, and settling in the jungle lands, defended themselves and their neighbours, and brought the land into cultivation. As in the present instance the exact origin of each tenure is generally lost in the confusion and obscurity of the troublous ages which preceded British Rule; but in this and many other instances we find them existing and useful at the earliest periods of which we have official record.

Here we may well notice Regulation XXIX. of 1814, which defines the *status* of ghatwals in one district, *viz.*, Beerbhoom, but does not deal with those of other districts. In the terms of the Preamble of that Regulation, the ghatwals of Beerbhoom, "according to the former usages and constitution of the country, are entitled to hold their lands generation after generation in perpetuity, subject to the payment of a fixed and established rent, and to the performance of certain duties." The real question, then, before us seems to be, are the ghatwals of Kurrukpore, especially the present defendants, of a character analogous to that of the ghatwals of Beerbhoom, or are they of a different, and of what character, *e. g.*, analogous to those of Bishenpore? The judgment of the Privy Council of 25th July 1855, in the case already referred to, throws much light on the character of the ghatwallee tenures of Kurrukpore, and, indeed, of ghatwallee tenures generally. As remarked by their Lordships, Beerbhoom immediately adjoins Kurrukpore, and throughout the judgment they seem disposed to consider that a strong analogy exists between the two sets of ghatwals. The lands, they say, "were held by a tenure long before the East India Company acquired any dominion over the country; there clearly was some ancient law or usage by which these lands were appropriated to remand the services of the ghatwals."

They go on to observe that in the zemindary of Kurrukpore the office of ghatwal was frequently held by persons of high rank, and that they were spoken of in terms such as might have been addressed to a Lord of the Marches with respect to a chieftain under his orders.

It appears to us that the tenure now before us is rather analogous to those of Beerbhoom than to those of Bishenpore. It is a large tenure of a superior character comprising many villages, and it has come down in the defendants' family from ancient times, subject to the payment of a fixed and established rent to the zemindar. We can have

no doubt of the hereditary character of the holding. All analogy, all history, and all the facts, which have been brought to our notice, go to show that, as a matter of fact, these tenures, whatever may have been the express terms of the grant, have been constantly handed down from generation to generation. Such being the nature of the tenure, are the ghatwals, under the circumstances stated by the plaintiff, liable to be evicted or not?

For misconduct and failure to perform the conditions annexed to their tenure they, no doubt, are liable to be, and sometimes have been, ejected; and, when so vacant, the right of nomination to the office, no doubt, rests with the zemindar. But no instance can be shown in which the zemindar on his own mere motion has ejected the ghatwal, and determined the tenure. We are quite clear that, under the established usage and constitution of the country, he cannot do so. Well, then, it is not alleged or pretended that the defendants have committed any default; that they have refused or failed to perform any service legally demandable of them. They themselves do not deny their liability to service, but say that they are able and willing to perform it.

It is not even attempted to be shown that circumstances have done away with the necessity for the service. On the contrary, on the face of the plaintiff's statement, it appears patent that the necessity has not ceased, for the plaintiff has voluntarily arranged to pay Government an annual sum of money for the performance of those very services by Government servants. The conditions of service expressed in the papers are not of a proper military character against foreign enemies, but rather against murderers, robbers, and cattle-lifters from the hills; and it cannot be said that murder, robbery, and cattle-lifting have entirely ceased. At any rate, on these proceedings it seems that the plaintiff has simply chosen to enter into an arrangement with Government to perform through others the duties which the defendants are bound to perform, and which we have not seen that they were either unwilling or unable to perform. This arrangement is certainly no ground for forfeiting the defendants' estate. The contract between the plaintiff and the Government, without the authority of the Legislature, in no way affects the *status* and the rights of the defendants. The service being required, they are bound to perform it; and by custom they hold the tenure subject to the performance of it. No act of Government and the zemindars can defeat the rights of the ghatwals.

In this case, moreover, we think that the use of the word "istemraree," or "perpetual," in Captain Brown's Sunnud of 1777, is, as we have said, strong evidence of the then *status*, and shows that, at that time, according to the belief and usage of the country, the tenure was of a perpetual hereditary character, and, therefore, that it would not be liable to forfeiture even were the service no longer required. We consider that the tenure in dispute is not a mere grant of land in payment of service to be rendered during pleasure; but a perpetual hereditary holding on a fixed jumma, leaving a beneficial interest in the ghatwals with a condition of service annexed; and that the Principal Sudder Ameen's argument that a man may dismiss his servant at pleasure has no application.

As to the case decided by the late Sudder Court on 11th December 1857, that was one in which the ground of resumption was the default of the ghatwal. That being proved, the resumption was valid. To that extent the case is an authority; but all the remarks beyond that point are *obiter*, and consequently not binding upon us in the present case.

Whether, in the event of circumstances independent of any action of the parties having rendered the service altogether unnecessary, the zemindar would have power to levy any and what assessment in lieu of the service, is a point which is not raised in this case, and on which we need not give an opinion.

Altogether, then, we think that the plaintiff's claim must be absolutely dismissed. We consider that the defendants hold a perpetual hereditary tenure at a fixed jumma in money and service, and that, except for misconduct on their part, they cannot be evicted. The appeal is decreed with costs.

The 17th June 1865.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Vendor and Purchaser—Benamee—Estoppel.

Case No. 14 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 19th December 1864.

Ram Mohinee Dossee (Defendant), *Appellant,*

versus

Pran Koomaree (Plaintiff), *Respondent.*

Mr. R. V. Doyne and *Baboos Banee Madhub Banerjee* and *Dwarkanath Mitter* for Appellant.

Baboos Unnoda Pershad Banerjee, Onoocool Chunder Mookerjee, and *Kalee Kishen Sein* for Respondent.

Suit laid at rupees 4,000.

A purchased *bonâ fide* and for valuable consideration, and registered under Act XI. of 1859, a mokurruree lease of an estate from *B* in whose favor it had been created by the former proprietors. HELD that *A's* title could not be questioned by a purchaser of the same estate at a subsequent sale for arrears of revenue, notwithstanding that the transaction between *B* and the former proprietors was *benamee.*

THE plaintiff purchased, at a sale for arrears of revenue, an 8 annas share of a turuf, called Mouna Dihi, comprising no less than 31 mouzahs. In that turuf were two mouzahs, called Ashna and Shib Ram Bali. On wishing to take *khas* possession, the plaintiff was opposed by the defendant Ram Mohinee, who pleaded possession under a mokurruree lease obtained by purchase from one Surbanund Puroheet, in whose favor it had been created by Ishan Chunder Roy and three other shareholders, proprietors of the turuf, previous to its sale for arrears of revenue.

Under these circumstances, the plaintiff sued to obtain *khas* possession of the mouzahs, alleging that both the mokurruree and the purchase were false and collusive, and that the Roys, proprietors, were still in possession.

Defendant Ram Mohinee alone appeared in the Lower Court, and her case was that her purchase was perfectly *bonâ fide,* genuine, and worthy of being respected; and she further added that, even if there were any collusion between Surbanund and the former proprietors as to the creation of the mokurruree, her purchase was good in law.

The Principal Sudder Ameen gave the plaintiff a decree, giving his reasons at some length, and insisting on the nature of the transaction between Surbanund and the Roys, proprietors, which, on the evidence, the Court thought fraudulent and false. In this view, the Principal Sudder Ameen held that Ram Mohinee could not derive a good title from a mokurruree, whose own title was founded on collusion and fraud.

In appeal, it is not attempted to be argued that the transaction between the proprietors and their Puroheet or family priest Surbanund is other than a mere paper transaction, though the evidence does not disclose any traces of fraud against any particular individuals. But the points on which the appeal has been argued at considerable length are as follow:—

First.—That it is not shown, by anything on the record, that the defendant Ram Mohinee had any knowledge of the real and precise nature of the transaction between Surbanund and the Roys.

And, *secondly,* that, even if Ram Mohinee were aware of the real interest in the mokurruree held by the Roys, she is a purchaser for valuable consideration, and her purchase, being untainted by fraud, ought to be respected. This second point, though not decided by the Lower Court, was pleaded in the statement of the defendant, and does most legitimately arise in the case as tried.

The following are the dates and particulars of this case which it is necessary to bear in mind in forming a conclusion:—

The mokurruree was created in favor of Surbanund on the 18th of Choitro 1265, at a jumma of 971 rupees, for a *bonus* alleged to be 3,900 rupees.

On the 1st of Magh 1268, Surbanund sold the mokurruree to Ram Mohinee for a consideration of 1,000 rupees.

The sale for arrears of revenue, at which the plaintiff became the purchaser of the turuf, did not take place until the 15th of Bysack 1270, or end of April 1863.

The evidence to the purchase of the defendant is that the sale and purchase took place at Moorshedabad; and, as a bare fact, we can have no doubt that the transaction took place exactly as stated, and that on this point little need be said.

But the first point to be enquired into is, what knowledge had the defendant of the real nature of the transaction between the Roys and their Puroheet, or what knowledge may a Court of Justice reasonably infer that she must have had?

We may here remark that there is no interest or connection shewn to exist between Ram Mohinee and the Roys, and nothing whatever to lead us to think that these parties are acting in collusion with each other, or with a view to maintain the practical possession of Ishan Chunder Roy and his shareholders—a view of the case which was suggested in argument.

The respondent insists somewhat on the evidence of his witnesses, some of whom

state that they were told to take receipts from Ram Mohinee or in her name; but that they were also told by Ishan Chunder that the possession and Ram Mohinee's was one and the same thing; but it is somewhat remarkable that these witnesses should have once brought receipts with them into court, which they were not asked to bring; and this allegation, that Ram Mohinee and the Roys were acting in concert in regard to the receipt of rents and delivery of receipts, certainly not supported by anything else in the record, and no such inference can, we think, be fairly drawn in the case. Then, again, it appears that Surbanund applied for the registration of his mokurruree under Act XI. of 1859 on the 11th of Magh 1268; and that Ram Mohinee, after her purchase, similarly applied for registration under the same Act and before the sale for arrears took place. The Collector was induced to think that, as the formalities prescribed in Section 41 of Act XI. had not been carried out, the applicant had not saved her tenure; but the Commissioner, in December 1863, held that the applicant, Ram Mohinee, was entitled to registration; that the notices had all been served prior to the sale for arrears of revenue; and that the order of the Collector should be reversed. This order was confirmed by the Board in April 1844.

Ishan Chunder, too, it appears, assented to the transfer by a petition to the Collector.

It is, however, urged by the respondent that these may be mere parts of the whole scheme of collusion, though this does not appear very probable; that there is no proof that the defendant Ram Mohinee is in possession; that the Roys are still in possession, Surbanund being, it is admitted, a mere name all through the proceedings; and that this failure would be fatal to the appellant's claim.

But, on this head, it is shown that Ram Mohinee instituted suits against ryots; appointed gomashtahs, and sued them for accounts; exercised all the acts of ownership; and, in various complaints that were brought before the Police when Pran Koomaree was endeavouring to get *khas* possession, constantly appeared as maintaining her own rights, and was never taxed with maintaining in reality those of Ishan Chunder Roy. It is quite certain that in the proceedings before Revenue and Criminal Authorities, there is not a word said about this lady being a *benameedar* for the old proprietors. Everywhere she appears as standing on her own rights, and in appeal we have heard nothing whatever to controvert these facts disclosed by the record and urged by Mr. Doyne. It is true, however, that the sale from Surbanund to Ram Mohinee was not for a very large consideration; but, on the other hand, it is shown that the profits of Surbanund from the two villages, after deducting the rent, was somewhat within 200 rupees after deducting all expenses. It is said, too, that it is unlikely that the Roys should have given away in mokurruree the two villages on which their family residences are situated. But, seeing that they were indebted, they may have thought a mokurruree lease to be one way of preserving their rents from a claim for enhancement by a new zemindar; and it is possible, though nothing of this kind is on record, that there may have been some agreement between them and Ram Mohinee regarding their dwelling-houses, and that they were not to be disturbed or annoyed. If there were any such understanding, there would be nothing improper in the same.

On the whole, we are of opinion that it is not necessary for us to fix with precision the exact amount of knowledge which Ram Mohinee had of the nature of the transaction between Surbanund and the Roys. It is possible that she may have been aware that Surbanund was only a name, and that the real and beneficial interest lay with other parties, who assented to the transfer to her.

But, even admitting this, we think that there is no reason why her purchase should not be respected. She, as we have said, is not shown to be related to, or connected with, the former proprietors in any way: for we cannot look on identity of caste, and the residence of her father-in-law in the same village, as sufficient proof of connection for purposes of fraud and concealment. Her purchase was made openly, in apparent good faith, for a valuable consideration, before any sale for arrears of revenue took place, or was even impending; and she applied for special registration, and for the issue of notices before that event. The notices were served on the 16th of April, and the sale for arrears took place on the 27th; she is also shown to have acquired possession, and to have acted for herself on several occasions; nor can we put any trust in the evidence of the witnesses for the plaintiff, who would have us believe that she was holding, not for herself, but for the Roys. It is unquestionable that, as against the Roys, Ram Mohinee would have acquired a good title; and that, after their acts of acquiescence in the

transfer to her, they would have been unable to impugn her title. If, then, her title would be good against the former proprietors, we see no reason why it should not stand good against a purchaser who never urged in the Lower Court that his purchase swept away all encumbrances under Act XI. of 1859, under which Act the defendant had applied for registry before the sale.

We must remember, too, that, although the transaction between Surbanund and the Roys is of the nature of a sham transaction, yet no fraud is shown to have been attempted against any one individual; and that the same must be judged as any other benamee transaction would be judged of, in which the ostensible interest lay with one party and the real with another, for, after all, the creation originally of the mokurruree in 1265 is of this character only.

This view of the case is also strengthened by the cases reported at pages 293 and 569 of Marshall, the principles of which decisions support the contention of the appellant in this suit.

For the above reasons, we think the appellant has fully made out her case; and on the second point raised we hold that, even if she did know that Surbanund was not the real owner, the whole circumstances of the case exhibit her as a *bonâ fide* purchaser, do not taint her with fraud or suspicion, and justify a Court of Law in maintaining her in possession of her two mouzahs.

The appeal, therefore, must be decreed, and the decision of the Principal Sudder Ameen reversed with all costs.

The 20th June 1865.

Present :

The Hon'ble *Sir* Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, J. P. Norman, and Shumbhoonath Pundit, *Judges*.

Decree (Execution of—by decree-holder after sale thereof).

Case No. 2001 of 1864.

Special Appeal from a decision passed by Mr. H. Richardson, Officiating Additional Judge of Bhaugulpore, dated the 18th June 1864, affirming a decision of Baboo Hurro Chunder Chatterjee Roy Bahadoor, Principal Sudder Ameen of that District, dated the 25th January 1862.

Seetaram Sahoo (Defendant), *Appellant*,

versus

Mohun Munder (Plaintiff), *Respondent*.

Mr. G. C. Paul and *Baboo Anund Gopal Paulit* for Appellant.

Mr. R. T. Allan and *Baboo Kishen Sunee Mookerjee* for Respondent.

A decree-holder cannot first sell a decree, and then sue out execution upon it.

This case was referred to a Full Bench by Bayley and *Macpherson, JJ.*

Bayley, J.—The plaintiff sued defendant, a decree-holder, for possession of certain lands, by the reversal of a sale in execution of decree, on the ground that plaintiff had purchased the decree under which the sale was made from the decree-holder (defendant). Plaintiff alleges, and defendant does not deny, that plaintiff was both original decree-holder and the auction-purchaser of the lands sold in execution of his own decree.

Defendant's case is that the plaintiff does not prove his alleged purchase of the decree; and that, even if plaintiff did, he cannot obtain possession by reversal of the sale, inasmuch as he did not take any steps to notify the same to the Court, as required by Construction No. 1341 of the 17th June 1842.

The first Court held that the plaintiff's alleged purchase of the decree was in time; and that consequently the defendant had no right to execute a decree which he had already transferred to another. The first Court accordingly decreed the plaintiff's case.

The Lower Appellate Court took the same view, adding that the form of notifying the purchase of the decree to the Court ought not to have been omitted, but that this omission would not invalidate plaintiff's right. The Lower Appellate Court, therefore, also decreed plaintiff's case.

Defendant appeals, specially urging :—

1st. That the Lower Appellate Court ought not to have found the plaintiff's alleged deed of sale to be genuine, as it did not bear defendant's seal.

2nd. That, as plaintiff only purchased a money-decree, he could not obtain a reversal of the sale in execution, and possession of the property thereby.

3rd. That the Court, at the time of the sale, had no other recorded decree-holder before it, except defendant himself, and that,

therefore, plaintiff's claim to be considered the decree-holder is untenable.

The *first* plea was not pressed; but I may observe that, as there is a clear finding of fact by both Courts below that the plaintiff had proved his purchase, this Court could not interfere in special appeal with such a finding of fact.

The *second* plea of itself is of no avail: for if the defendant, as decree-holder, could sell the land (which he did) in execution, the party buying his decree could do the same; at any rate it is not for defendant, in such a position, to question the act.

But on the *third* plea I hold that Construction 1341 of 17th June 1841 prescribes a proper rule of law, *i. e.*, that it is essential to the formal recognition by a Civil Court of the transfer of a decree that the transferer should certify the fact to the Court; and that, until such fact be so certified, the originally recorded decree-holder alone can be regarded as the decree-holder who can properly execute the decree by sale or otherwise.

Applying this rule to this case, I am of opinion that this Court cannot, in this suit, decree possession to plaintiff; for it could only really do so by the reversal of the sale in execution; and that sale, I hold, it cannot reverse in this suit for the reasons above given. I may add that the fact of the decree-holder being himself the purchaser in no way alters the case; for there is no legal prohibition to his being the purchaser.

I am willing to state that plaintiff, if so advised, will not, by this decision, be barred from bringing a separate action against the defendant, as his alleged vendor, for breach of contract; and, on the facts found below in this case, this view may be pleaded to show the defendant ought to account to plaintiff for the property which really had been transferred to defendant, but had been appropriated by a fraudulent act of plaintiff.

I would accordingly decree this special appeal as in *this suit;* but, looking to the finding of facts below as to the reality of the transfer of the decree to plaintiff from defendant, it is a case where the appeal should be decreed without costs and with the declaration above made.

Macpherson, J.—In this case, it was, no doubt, the duty of the plaintiff (the respondent in this Court) to have taken such steps on purchasing the decree as would have prevented the possibility of the original decree-holder taking out execution as he has done. But I do not consider that his neglect of that duty is any bar to his applying to the Court for relief against the fraud which, it is found as a fact, has been practised upon him.

His suit is bad so far as it seeks to reverse the sale which has taken place. The sale must stand, and cannot now be set aside, as it was made strictly in accordance with the provisions of the law. But the appellant Seetaram Sahoo was guilty of a gross fraud and breach of faith towards the plaintiff in taking out execution, and purchasing these lands himself after he had sold his decree to the plaintiff; and it appears to me that a Court of Equity will fasten a trust upon the lands so purchased, and will declare that the appellant holds them as a trustee for the plaintiff. The plaintiff is, in my opinion, entitled, at his option, to recover either the amount realized by the execution sale and paid into Court, or the lands purchased together with wasilat, on making good to the appellant the purchase-money paid by him. The plaintiff has elected to proceed against the lands, and in this suit he substantially asks for what he has a right to, although he also prays that the sale in execution of the decree may be set aside, which it cannot be. I think the decree ought not to reverse the sale, but should declare that the appellant Seetaram Sahoo has been in this purchase a trustee for the plaintiff, and should order that possession of the purchased lands be given to the plaintiff with wasilat; the amount paid by the appellant into Court on his purchase being made good to him by the plaintiff. With this modification I would confirm the decree appealed against. As I differ from my colleague on this point, let the papers go before a third Judge without delay.

Decision of Full Bench.—This is a very clear case. The plaintiff sues to set aside an execution and a sale under it. He was a purchaser of a decree from the defendant Seetaram. It appears that Seetaram had obtained a bond from Chumaran and others, by which the lands in question were pledged to Seetaram. Seetaram sued upon that bond, and obtained a decree for the sale of those lands. Previously to the decree being obtained, and whilst the suit of Seetaram was pending, the plaintiff purchased from Chumaran and others (the defendants in that suit) the lands in question; and, in order to prevent the lands which he had so purchased from being taken in execution of the decree, the plaintiff purchased the decree from the defendant Seetaram; and that fact

(as has been found by the Court of first instance) was not disputed. Having sold the decree to the plaintiff, the defendant, notwithstanding, took out execution as he would have done if the decree had not been sold; and then he says to the plaintiff, "You cannot upset my execution, because "you did not comply with Construction No. "1341 of the 17th June 1842." But that Construction was never intended to enable a person in the position of the defendant Seetaram to commit a fraud by first selling a decree, and then suing out execution upon it.

We think that the decision of the first Appellate Court must be affirmed with costs.

The 21st June 1865.

Present:

The Hon'ble Shumbhoonath Pundit and G. Campbell, *Judges.*

Vendor and Purchaser—Benamee—Estoppel.

Case No. 1502 of 1864.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 21st March 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 19th December 1863.

Luckhee Narain Chuckerbutty (Plaintiff), *Appellant,*

versus

Taramonee Dossee and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Bungshee Doss Seal* for Appellant.

Baboos Unnoda Pershad Banerjee, Dwarkanath Mitter, Hem Chunder Banerjee, and *Mohesh Chunder Chowdhry* for Respondents.

A party cannot allege or plead his own fraud. Nor can his representatives or private purchasers from him do so, unless they are themselves the defrauded parties, and seek relief from the fraud.

THIS case involves a somewhat nice point, and has been complicated by the proceedings of the Judge who first overruled the decision of the first Court, and remanded the case for trial on another issue; but, on the case again coming before him after remand, seems to have returned to the doctrine which he had before overruled, and decided the case on that point without going into the additional issue on which he had ordered the remand. If, however, the Judge's last decision is good in law, it will decide the case, and we need not go farther into this and other points.

Plaintiff sues to set aside a mokurruree created by his vendor from whom he purchased the estate by private sale. The deed of sale recited that the mokurruree was a mere benamee created in fraud of creditors and that the vendee might set it aside. The vendee had, therefore, full notice of the encumbrance.

The defendant, pleading a *bonâ fide* holding, alleges that the plaintiff's vendor has publicly admitted the reality of the transaction in a suit in a Court of Justice, and that is found to be so.

It is quite clear that, if the plaintiff's allegation be true, the deed of *mokurruree* was a fraudulent one; and the Judge, holding that the plaintiff's vendor could not have come into Court on such an allegation, considers that the plaintiff himself is also similarly affected, and dismisses his suit. The leading case on the question of pleas of fraud of this kind is that of Trilochun *versus* Obhoy Churn, decided on 28th December 1859, and in that decision we entirely concur. The effect of the decision is that a party cannot plead his own fraud, and that the party who makes that allegation must fail. If the plaintiff alleges that the deed is *bonâ fide*, and the defendant pleads that it is a fraud to which he was a party, the plea cannot be heard, and the plaintiff must have a decree. If the plaintiff alleges that he and the defendant were equally parties to the fraud, he cannot be heard, his suit must at once be dismissed. The case quoted and other cases sufficiently establish that the heirs of the fraudulent parties representing them are equally bound with the original parties. The only distinction sought to be drawn in this case is that the present plaintiff is not an heir, but a private purchaser. We cannot draw any distinction. We think that all representatives are equally bound, and that the plaintiff is bound. The exception is only when a plaintiff is himself a defrauded party, and comes into Court for relief from a fraud against himself perpetrated by his vendor in collusion with the other party. This would, we think, be the case of a purchaser at a compulsory execution sale; because the fraudulent transfer would be, in fact, a fraud committed both against the creditor and against the execution-purchaser. It may also be that, if plaintiff's vendor had defrauded him by concealing this tenure altogether, and inducing him to give valuable consideration in ignorance

of it, he might, on proving such a case, have a good action against both the parties who created the fraudulent tenure. But in this case he cannot say this — on the face of his deed of sale, he was made aware of the transaction.

We think, then, that plaintiff stands simply in the shoes of the vendor, and that both the vendor and his present representative are equally incompetent to come into Court, claiming the vendor's fraud. If it were otherwise, a fraudulent party himself precluded from bringing a suit, might cure all defects by merely setting up a purchaser under himself, who he would obtain through a purchaser for value of a good title. We dismiss the appeal with costs.

The 21st June 1865.

Present:

The Hon'ble Shumbhoonath Pundit and G. Campbell, *Judges.*

Mahomedan Law—Restitution of Conjugal rights—Divorce—Dower—Adultery (charge of)—Ill-treatment of Wife.

Case No. 2454 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Kamroop, dated the 7th June 1864, affirming a decision passed by the Sudder Moonsiff of that District, dated the 28th December 1863.

Jann Beebee (one of the Defendants), *Appellant,*

versus

Sheikh Moonshee Beparee (Plaintiff), *Respondent.*

Babu Obhoy Chunder Bose for Appellant.

No one for Respondent.

The charge of adultery by a Mahomedan against his wife does not operate as a divorce, though, if false, it may be an item of ill-usage towards making up a sufficient answer to his claim for restitution of conjugal rights. The husband cannot enforce his right to his wife till he pays the dower, in the absence, that is, of any sufficient answer to his claim Ill-treatment by husband his second wife would justify the first wife in leaving him.

This is a suit by a husband for restitution of conjugal rights. The parties are Mahomedans, and it appears that the plaintiff has another wife.

The wife pleaded:—

(1.) That plaintiff has charged her with infidelity and proved it: and that this operates as a divorce.

(2.) That plaintiff has not paid her dower.

(3.) That plaintiff torments her on account of his having a second wife: and that he merely brings the suit out of spite.

It seems that the wife brought suits for maintenance and dower; the suit for maintenance was dismissed—that for dower decreed. In the present suit, plaintiff says that he is ready to pay, and has tendered the dower; but the wife will not receive it.

On hearing the special appeal of the wife, we think that the Courts below have rightly held that a charge of adultery does not operate as a divorce, though a false charge might be an item of ill-usage towards making up a sufficient answer. A true charge would be no step towards such an answer.

As respects non-payment of the dower, the Court below says that it has been paid: and in that there seems to be some error which we correct by directing that the two decrees are to be treated as cross-decrees, and to be, as it were, set off against one another. The plaintiff cannot enforce his right to his wife till he pays the dower, in the absence, that is, of any sufficient answer to his claim. For though it is not one of the written grounds of special appeal, the allegation of torment by plaintiff and his second wife is, we think, so essential a plea that it must be tried; and as the Lower Courts have not tried it, we remand the case to the first Court with a direction that it will frame and try an issue to find whether plaintiff, by his real treatment of, and conduct towards, his wife, has given her sufficient ground for leaving him. A woman who marries a Mahomedan knows that he may have more than one wife; but if he marries a second wife, and they make the position of the first wife unreasonably hard and disagreeable, she would be justified in leaving. In this case, we should hope that the parties may find it best finally to set their respective decrees against one another, and so end the matter. In that case, the remaining issue need not be tried.

The case is remanded accordingly.

The 21st June 1865.

Present:

The Hon'ble C. Steer and W. Morgan, *Judges.*

Limitation—Suits against depositaries—Oral evidence of deposit sufficient.

Case No. 4251 of 1864.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 1st August 1864, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 31st March 1864.

Rutton Monee Debia (Plaintiff), *Appellant,*

versus

Gunga Monee Debia Chowdhrain and others (Defendants), *Respondents.*

Baboos Unnoda Pershad Banerjee, Onoocol Chunder Mookerjee, and *Khetter Mohun Mookerjee* for Appellant.

Mr. C. Gregory and *Baboo Debendro Narain Bose* for Respondents.

Clause 15, Section 1, Act XIV. of 1859, applies where there is some relation of trust, whether the property is given in mortgage or pawn, or simply deposited for safe custody.

Oral evidence of the deposit, if credible, is not insufficient.

THE suit is apparently barred by limitation, more than three years having elapsed from the time of the loan, and no written acknowledgment being shown. The alleged entries of payment of interest in the defendant's books are clearly insufficient to satisfy the 4th Section of Act XIV. of 1859, which requires a written and signed acknowledgment to avoid the Law of Limitation. In the judgment of the Court of first instance, reference is indeed made to an order in one of the books of the 7th Pous, which is said to be signed by the defendants with their own hands; but the purport or terms of that entry do not clearly appear. The Lower Appellate Court holds, differing from the judgment of the first Court, that the money was not deposited, but lent. We cannot disturb the finding of facts, but we are not satisfied that the judgment proceeds upon a correct apprehension of the law, and we shall, therefore, remand the case for re-retrial by the Judge, both parties being at liberty to produce whatever evidence they may think fit.

Referring to Clause 15 of Section 1 of the Act, the Judge states that it does not relate to "money given simply to take care of." But this construction is, we think incorrect. Where there is some relation of trust, whether the property is given in mortgage or pawn, or simply deposited for safe custody, the Section applies. Again the Judge remarks that only oral evidence is given of the deposit. But this, if credible, is not insufficient, and nothing is stated against the credibility of the witnesses who in the Principal Sudder Ameen's judgment are described as "respectable witnesses cited by the plaintiff and the defendant Gunga Monee." Whether the estate of Kashee Chunder alone or both estates are liable is a distinct question, which may also arise for decision if the Judge finds in the plaintiff's favor that this was not a loan, but a deposit. The decision of this will depend upon whether the deposit was with Kashee Chunder alone, or with him on his own behalf, and as managing the affairs of the widow and minor son of Kalee Chunder. The books kept under Kashee Chunder's management, even if fraudulent as between him and his relation, as is suggested, are not stated to be in any way false as regards the plaintiff's claim to recover.

We remand the case to the Lower Appellate Court.

The 21st June 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Jurisdiction—Possession of land—Awards of Deputy Magistrate—Alluvial lands—Meaning of "fordable."

Case No. 9 of 1865.

Regular Appeal from a decision passed by the Additional Judge of Dacca, dated the 29th September 1864.

Juggobundhoo Bose (one of the Plaintiffs), *Appellant,*

versus

Gyasoodeen and others (Defendants), *Respondents.*

Baboo Chunder Madhub Ghose for Appellant.

Baboos Dwarkanath Mitter, Sreenath Dass and *Romesh Chunder Mitter* for Respondents.

Suit laid at rupees 1,565.

Case No. 15 of 1865.

Special Appeal from a decision passed by the Additional Judge of Dacca, dated

he 29th September 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 19th February 1864.

r Chunder Sein and others (Defendants), *Appellants,*

versus

ee Doss Hajrah and others (Plaintiffs), *Respondents.*

Baboo Onoocool Chunder Mookerjee for Appellants.

ss Sreenath Doss and *Romesh Chunder Mitter* for Respondents.

award by a Deputy Magistrate under Section 318, XV. of 1861, is not an award of a competent Court Section 14, Act VIII. of 1859.

iver that can be crossed zig-zag in the dry season when the water is breast-high, and the main stream ch is indubitably on the other side, is not a "*ford-* stream within the meaning of Clause 3, Section 4, ation XI. of 1825.

HESE two cases have been heard to-er.

the Regular Appeal, the Judge record-he following decision :—

The plaintiff in this case sued in the ourt of the Principal Sudder Ameen of urreedpore for possession of certain lands reversal of an order under Section 318 Act XXV. of 1861.

The defendant urges that he had insti-ed a suit for the same land in the Court the Principal Sudder Ameen of Dacca. Civil Court Ameen, being deputed to estigate, found that the land sued in this suit was identical with that d for in Dacca. The Principal Sudder een of Furreedpore, therefore, trans-ted the case to the Judge of Dacca, whom the case was transferred to Court for order. The plaintiff pe-oned this Court to the effect that the een's report was erroneous, and request-the case might be sent to Furreedpore. This Court declined to comply with this ition, and when appeal case No. 599 of 63 (*i. e.*, special appeal No. 15 of 1865) s heard, it was admitted that the deci-n therein *should govern this case*, there-e, for the reasons given in my decision s day in Appeal No. 599 of 1863, this se is dismissed with costs."

the above Regular Appeal now before the original suit was No. 7 of 1863 be-the Principal Sudder Ameen of *Furreed-t* and the plaint was filed on the 2nd ary of that year.

Juggobundho Bose with others was plaintiff, and Syed Banoo Ameen and others, defendants ; and the claim was by plaintiff for beegahs 533-6½ cottahs of land as situated in ⅞ths of the 14-anna share of zemindary No. 2 of the Dacca Collectorate.

The allegation was that the land claimed was an alluvial re-formation of diluviated land of one Manick Khan, and the suit was for possession, to reverse an order of the Deputy Magistrate of *Madareepore*, in Zillah *Furreedpore*, passed under Section 318 of Act XXV. of 1861, retaining in possession Gour Chunder Doss and others, who claimed the identical land in dispute as part of their talook *Kesubpore* and chur *Kesubpore*, of Zillah *Furreedpore*, re-formed on the site of the original diluviated lands of their talooks.

Defendant, Kalee Doss Hajrah, urged in that case that the Principal Sudder Ameen of Furreedpore had *no jurisdiction*, as in another case, which is here special appeal No. 15, it had been found on the investigation of a Court Ameen, accepted by the Principal Sudder Ameen of *Dacca*, that the lands belonged to Zillah *Dacca*. On the merits, the defendant claimed the lands as in kismuts of his land chur Muddun Sunker, Government lands, purchased at auction by defendant from Government.

Defendant Gour Chunder Doss claimed the lands (as before remarked) as part of his talook *Kesubpore* and chur *Kesubpore* in Zillah *Furreedpore*, and relied on his possession as maintained by award of the Deputy Magistrate of *Madareepore* under Section 318 of Act XXV. of 1861.

The Collector of Dacca, who was made a defendant, pleaded that the lands were held by a competent Court, that is, by the Principal Sudder Ameen of Dacca, to lie in *Dacca;* and that, under Section 14 of Act VIII. of 1859, that fact fixed the jurisdiction in *Dacca.*

On the merits, the Collector also pleaded that a competent Court had already held the lands to be those of defendant, Kalee Doss Hajrah, as Chur *Muddun Sunker*, formerly a Government khas mehal of *Dacca;* that this decision of the Principal Sudder Ameen, in fact, duly and legally reversed the award of the Deputy Magistrate of Furreedpore in favor of Gour Chunder Doss; and that the lands were all along lands of Government till sold.

These were the pleadings in the case which form the subject of the regular appeal before us, and the decision has been before cited.

Now as to the special appeal. There the plaintiff was Kalee Doss Hajrah, and the defendant was Gour Chunder Doss.

The pleadings were substantially the same as above. The first Court (Principal Sudder Ameen of Dacca) gave plaintiff a decree on the 19th February 1863. The Principal Sudder Ameen held that, as a reference to the *official maps* of the civil jurisdictions of *Dacca* and *Furreedpore* shewed that the lands in suit were in *Dacca*, he had jurisdiction ; and that this was confirmed by the reply of the Collector to an enquiry by the Principal Sudder Ameen, whether the land in suit was in Dacca or Furreedpore.

The Principal Sudder Ameen then refers to the map of the locality made by the Civil Court Ameen, and accepts the evidence it affords that the flowing stream of the Pudda divides the lands in suit from defendant's main land, and adds that he saw no discrepancy as to boundaries between the Ameen's map and that filed by the parties.

The Principal Sudder Ameen notices further that the map shows that the only way in which the river can be crossed *on defendant's side* is by going breast-deep in a zig-zag direction over the higher lumps of land which may be at the bottom of the bed of the river, and that only at the dry season and in the one direction only ; while clearly only shallow water divides *plaintiff's* land from that in suit. The Principal Sudder Ameen finds tnis view further supported by all the evidence on the record, and refers to other probabilities in plaintiff's favor, from proximity of other pieces of chur, &c. The Principal Sudder Ameen accordingly gives plaintiff a decree subject to any arrangements to be made at the settlement, and reverses the order of the Deputy Magistrate of Madareepore giving possession to defendant.

Defendant appealed.

The *Judge* on that appeal finds very clearly on the evidence that the land in suit is on the *Dacca side* of the Pudda, and is *not*, therefore, either in the jurisdiction of the *Furreedpore* Court or part of defendant's talook. The Judge accordingly dismissed defendant's appeal.

We have a special appeal against this decision, and the main point argued before us in the special appeal is that the Deputy Magistrate of Furreedpore was a competent Court, under Section 14 of Act VIII. of 1859, to fix the jurisdiction by his award under Section 318 of Act XXV. of 1861 ; that no other Court than that of the Principal Sudder Ameen of *Furreedpore* could take jurisdiction. On this plea we may at once remark that a ruling of a Full Bench of five Judges has held, on the 20th June 1865, that such an award by a Deputy Magistrate is *not* the award of a competent Court under Section 14 of Act VIII. of 1859 ; and this renders any further consideration of the other arguments upon this plea unnecessary. We wish, however, to add that there is no material or substantial difference to our minds between a Principal Sudder Ameen "*transmitting*" a case to the Judge, and the Judge then deciding it as here, and a Judge who admittedly has jurisdiction both in Dacca and Furreedpore, "*calling for*" a case, and deciding it by that process, of the legality of which there is no doubt. We think, therefore, that this is a frivolous objection.

Then in the regular appeal, and to a certain extent also in the special appeal, the plea is that, as it is found that people could cross in the dry season on defendant's side, it is "*fordable*" in the sense of Clause 3 of Section 4 of Regulation XI. of 1825 ; and thus defendant has as much right as plaintiff. A case is stated to have been decided in support of this view of what "fordable" means. But it is not specified or handed to us.

Now, on the evidence laid before us, we are unhesitatingly of opinion :—

1st. That the *Jaree Pudda Nuddi*, or main stream of the Pudda, is on the *Furreedpore* side.

2ndly. That the water on the *Furreedpore* side can only be *forded* at any time by folfowing, not any direct or usual ford straight from side to side, but only by taking, in a zig-zag direction, advantage of the higher portions of the bed of the river, and that even only with the water breast-high ; while on the other or *Dacca* side is generally a shallow, *i. e.*, water varying from 1 to 2¾ths cubits only. It is argued that, if, even in this way, a person can get across, it is a '*fordable*' stream, and defendant can claim the land under the words of Regulation XI. of 1825. The construction of a law must, however, in our mind, be *reasonable*, or to use the words of Dwarris on Statutes, page 550, Edition 1848, "to construe "the words according to the subject-"matter in such a sense as to produce a "*reasonable* effect, and with reference to "the circumstances of the particular trans-"action." Again, that interpretation is to be accepted which does not *intend a wrong*, page 551. Further, in page 552, "not the

word of the law, but the sense and reason" are to be looked to. The law is to be interpreted, "not according to the letter, but according to the meaning." Now, if with the fact before us that the main stream of the great river Pudda is on the *Furreedpore* side, that there is no general plainly recognized direct ford there, while on the *Dacca* side there is, without a shadow of doubt, only very shallow water and properly fordable in the reasonable and ordinary term of the word, would it be just or rational to withhold from plaintiff his decrees ?

Under these circumstances we are clearly of opinion that we must decide entirely in favor of plaintiff's case.

We, therefore, do so, and dismiss the regular and special appeals accordingly, both with costs.

The 22nd June 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Witnesses (recusant)—Attachment of their property.

Case No. 411 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Mymensing, dated the 21st December 1864, modifying a decision passed by the Sudder Ameen of that District, dated the 29th April 1863.

Sheikh Jafur (one of the Defendants), *Appellant,*

versus

Gooroo Pershad Doss Potedar (Plaintiff), *Respondent.*

Baboos Onoocool Chunder Mookerjee and *Kishen Dyal Roy* for Appellant.

Baboos Debendro Narain Bose and *Bhuggobutty Churn Ghose* for Respondent.

A Court should not refuse, in the application of a party, to compel the attendance of his recusant witnesses, being material witnesses, by attaching their property.

THIS case has been already once remanded in order that the Principal Sudder Ameen should take into consideration the objections urged by special appellant Jafur, who appeared as respondent in the Lower Appellate Court, and, under Section 348 of Act VIII. of 1859, urged that the first Court had not, as requested by him, compelled the attendance of his recusant witnesses by attaching their property. The Principal Sudder Ameen has now considered this point, and has decided that, as the special appellant asked for the attachment of his witnesses' property on the 29th April, the day on which the case was decided, the Court was right to reject his petition. This is objected to on special appeal. We find that, after the issue of summonses on the witnesses without any effect, the special appellant, with permission of the Court, took out warrants for their arrest returnable on the 28th April and on that date the Nazir returned them with a report that the witnesses could not be found. The special appellant on the next day, the 29th, asked that their property might be attached. The Sudder Ameen simply refused the request, and decided the case on that very day against the special appellant. We do not agree with the Principal Sudder Ameen that this was a proper mode of proceeding. Under the law, the Sudder Ameen should have enquired whether the witnesses were material witnesses, and there seems but little doubt that they were most material, and, if they were material, he should have complied with the special appellant's request. His proceedings simply refusing this request was illegal, and it is surprising to us that the Principal Sudder Ameen should have upheld such improper proceedings. The judgment of the Principal Sudder Ameen must be reversed, and the case remanded to him in order that it be sent back to the first Court to proceed according to law as above directed in the matter of these witnesses. The Principal Sudder Ameen should take this case out of its turn, and decide it in two months.

The 22nd June 1865.

Present:

The Hon'ble H. V. Bayley and G. Cambpell, *Judges.*

Allegation of joint ancestral property—Onus probandi—Real nucleus.

Case No. 356 of 1864.

Regular Appeal from a decision passed by Moulvie Mohamed Nazeem Khan Bahadoor, Principal Sudder Ameen of Mymensing, dated the 25th June 1864.

Dukeena Dabee (Plaintiff), *Appellant,*

versus

Kishen Chunder Sandyal (Defendant), *Respondent.*

Baboos Sreenath Doss and *Kishen Dyal Roy* for Appellant.

Mr. R. V. Doyne and *Baboos Unnodapershad Banerjee* and *Dwarkanath Mitter* for Respondent.

Suit by widow of defendant's brother for half share of an alleged joint ancestral property. HELD, under the circumstances of the case (the plaintiff making a stale claim), that very moderate proof was sufficient from the defendant. The defendant's evidence and the plaintiff's own conduct established that the original estate which was the nucleus of the subsequent acquisitions was the mother's estate, and the acquisitions of the defendants made after the mother's death upon the estate to which he had succeeded after her.

THIS case was remanded on the 18th March 1863, the plea of limitation being over-ruled, and it is now tried on the merits. The Lower Court has found for the defendant Kishto Chunder.

The claim is one by the widow of defendant's brother, alleging that she is entitled to half the estate held by him in land and money of considerable amount.

The defendant alleges that the plaintiff already holds half of the only patrimonial inheritance of the family, a piece of bromutter land of two *poorahs* in Bolabita; all the rest is the property of the mother (who survived plaintiff's husband Mohesh, and to whom, therefore, plaintiff is no heir) and defendant's own acquisition.

The Principal Sudder Ameen finds that, in truth, the father Gooroopershad was a poor man, who died long ago, leaving nothing material beyond the piece of bromutter land before referred to; that the mother Koomaree was the daughter of a rich zemindar; that she received much from the father and mother; and during a long widowhood acquired much more for herself, and not for her sons; that the defendant succeeded his mother, and made acquisitions on his own account—hence the property claimed belongs to the defendant, and that plaintiff has no right to share it, although, in mere food as the son of his mother, her husband, no doubt, lived in commensality with his mother and brother.

Plaintiff's case being consequently dismissed, she appeals.

The case is one of some difficulty from the obscurity and, to some degree, conflicting character of the evidence. The plaintiff seeks to throw the *onus* of proof wholly on the defendant, and her case is that he has not satisfactorily proved the separate acquisitions, especially as he has not produced the family accounts. Defendant's Counsel on the other hand quotes a case of 11th November 1862 (Sutherland's Reports, Special Number, page 57) in which it was decided that, notwithstanding commensality in food if there was no joint ancestral property to form the nucleus of subsequent acquisitions joint property and joint acquisitions are not to be presumed, but must be proved. Defendant urges that the same rule applies when the patrimonial property is so small as to afford the barest means of subsistence and gives no real nucleus for the acquisitions; and he argues that in this case the was the character of the patrimonial property; that it was not converted into fund for speculation, and thus for acquisition, but remains intact; and that, therefore, in this case plaintiff must bear the burden of proof under the precedent cited.

How the *onus* may require to be placed in each case depends upon the facts which may be discovered to be the peculiar facts in it; and that can only be properly declared when the evidence has been gone into; but we think that a plaintiff, coming into Court, as does the present plaintiff, very many years after the transactions to which the claim relates, and after she has for very many years quietly submitted to an entire deprivation of her alleged rights (where there is too, as here, a deed showing this recorded by herself, and those of her relations much interested to prevent her alleged rights being impugned), one cannot expect the other side to furnish such clear and positive proofs as in the case of recent transactions. In this view however, much the burden lies on the defendant, we shall be satisfied with a moderate amount of proof on his part.

It appears that the father of the brothers, named Gooroopershad was, without doubt, a poor Koolin Bramin from a different part of the country, who came over into Mymensing, married one Koomaree, the daughter of a rich zemindar, and settled there. We are not informed exactly when he came and married, or even when he died; but from all that we learn, it appears that he died when the two sons were mere infants. We may, therefore, presume that he could have lived but a few years after his marriage, as far as can be inferred from other facts, such as the age of Mohesh Chunder when he died, *viz.*, at the age of 22. Gooroopershad, the father, seems to have died somewhere about 1230 B. S. It is clear, too, that, after plaintiff's husband's death, plaintiff lived in the house of her own mother, and not with Koomaree, the mother of her husband Mohesh, and brother-in-law Kishto. Then comes the question did Gooroo-

pershad have sufficient property to give a real nucleus for acquisitions? It is clear to us that he did not himself make any tangible acquisitions. The plaintiff relies on the evidence of an old family servant Ramkessub, now in the service of her own family, who states that Gooroopershad left 20,000 or 25,000 rupees in cash and outstanding debts; but this man is too good a witness. He certifies too completely in favor of the plaintiff; but at the same time in a very vague way, when he at any rate should have been able to give *some* reliable detail; and on a careful consideration of the tenor of all the evidence, we are constrained to say that we do not believe him. We see nothing in his deposition of the precise sources from which Gooroopershad could accumulate wealth. The vague statement of the money left by him is quite unsupported. On the contrary, we think that he was never a man possessed of means, and that he in fact died poor, *i.e.*, without leaving any ancestral property, except the very small amount which we do not think can be reasonably deemed a nucleus for the acquisitions subsequently shown.

His widow, however, was, as has been said, the daughter of a rich zemindar, and it is in evidence that she received many valuable presents in cash and otherwise from her father, mother, and other relations. Here then seems, on the other hand, to be a very probable nucleus of subsequent acquisitions, and she seems to have made the most of her money during the long subsequent period, and actively employed it. In fact, the real question is narrowed into this: was Koomaree acting on her own account with *her* money, or, as the guardian, with the money of her sons derived from their father? Even the plaintiff's most favorable witnesses and relations, such as Ram Chunder and Hurro Chunder, cannot say absolutely if Koomaree dealt with the property as guardian for the sons, or as it were her own separate property. But, if it had been the one or the other, these witnesses would have learnt the fact, and been able to speak decidedly. It is certain that Koomaree, almost in every case, ostensibly acted for herself, and not for them. And, even when they were grown up, and their names on two or three occasions appeared as if they took some part in the business, we find them acting only as her agents, and signing themselves as her mooktears, except as regards the small patrimonial bromutter, that did not act in the character of guardian.

There is not a single instance shown to us of her having signed or acted, and spoken as mother and guardian, which is the usual course when the position is such. There seems to be reason to believe that, when her sons were mere infants, she took one or two bonds in the name of each of them separately, but really for her own money advanced by her—a very common practice, and not necessarily indicating a joint possession of the two sons. These bonds were subsequently all amalgamated into one instalment-bond for the whole 17,000 rupees in the name of Koomaree alone, and for which Koomaree *alone* got a decree, which was never claimed or questioned while she was alive. We find, too, that in her own name she acquired some of the real properties now in suit. A bond of small amount in favor of the two brothers jointly, and upon which a suit was brought, was much relied on by plaintiff; but it is satisfactorily shown by the other side that this bond was connected with the patrimonial bromutter already alluded to, being executed by a ryot of *that* land, and the suit having been dismissed on the ground of duress. Thus, that bond, as showing the different course followed in regard to the really paternal property, rather strengthens the conclusion to be drawn from the different mode of dealing with the remaining property. Another copy of a joint bond said to be taken from another office, that of a Deputy Collector, was put in by plaintiff on the day of the hearing, and so not alluded to in the judgment. Seeing that the original is not accounted for, and that defendant had no opportunity of meeting at the trial this evidence, we cannot attribute any weight to it. Then as to Dagoo Buias's evidence as to his bond, we can only say that we discredit it. His volunteered statement that, on the payment of the money, he asked why he should pay one when he had given the bond to two, and the fact of his being related to plaintiff's mooktear, make us suspect his testimony as tutored.

It is here to be noticed by us that a certain power of attorney to obtain money from the Collector, from Koomaree to her sons, dated 5th Jeyt 1251, was pressed upon the Court in order to show that Koomaree regarded the money as theirs, because she told the sons to draw it. Now, it was not for Koomaree, a woman of rank, to be expected to go and draw it in person. Then who could be more properly selected the agents to draw it for her than her sons?

Defendant accounts for the non-production of the family books by saying that the plaintiff never asked for them till a day or two before the final hearing on remand (upwards of a year after the remand), and that as they referred to a period ending eighteen years before the date on which they are called for they were lost. Defendant adds that he could not, therefore, produce them. Although, under other circumstances, the non-production of the accounts would have told very heavily against the defendants, still we think, in this case, the defect stands alone, and there is some reason in defendant's excuse. In fact, after so long a period, and in the absence of more explicit evidence, we must be much guided by the conduct of the parties themselves. We have seen what was that of the mother Musst. Koomaree. Now let us see what was that of plaintiff. On her husband's death (if her present case be true) about 1253 B. S., she was the owner of half the property of the family, and she is herself no unsupported female, but (as the pleader says) is related to rich and influential persons, who, it may be presumed, would see to her right. Did she then claim the property or live in joint enjoyment of it? Certainly not, but exactly the reverse. For it is in evidence that a deed, *i. e.*, a kubooleut, dated 9th Assin 1254, was executed by her on her own part, and her brother on the other part, after her husband's death, and before her mother-in-law's death.

That deed was publicly and promptly registered. It very circumstantially recites that plaintiff had been left a widow *without any property*, that she has taken up her residence with her brother, and that, therefore, in lieu of an annual maintenance in cash, a talook on a light rent is given for her support. Can we for a moment suppose that, if her own family had the least idea that she would claim half the considerable estate of her husband's family, and was wrongfully kept out of it (she certainly was out of it), they would have executed and published to the world such a document? Nor do we find either plaintiff or any one on her behalf from that time till she now sues, many years after, swerving from, or questioning that statement of hers or its natural effect, that is, that she had no right to any property as left by her husband's father and as heir to that husband, who, as her case would have been, had left very large ancestral property, while at the same time plaintiff lived more or less on the bounty of her own family. Again, that plaintiff was not indisposed to pass over any claim she might have is ev dent when a little after in 1256 the mothe in-law dies, plaintiff then puts in a claim *heir not of her husband*, but of *her mothe in-law* Koomaree, and *not in her own rig as joint heir* to *Gooroopershad's proper* through her husband, but on the ground th she has authority *to adopt a son*—an asse tion which she has never substantiated. Th claim being rejected, she sleeps over her su posed right for some nine years more, till th very extreme limit of the period for suing and it is to be noticed that all this time a had available evidence in Ramkessub a Hurro Chunder. After all this quiescenc she puts in a suit which was nonsuite and which is followed by the present su We may add that there is no claim mentio ed in the plaint, nor any issue propose by plaintiff, as to any such sums in ca having been left by Gooroopershad as stated by her witness Ramkessub to hav been left by Gooroopershad, whereas th specific claim in the schedule as to Mohes Chunder's property is for 398 rupees wor of moveable, and the small parcel of br mutter lands of two poorahs or 8 beegahs i Bolabita.

Thus, on the whole, we think it perfect clear from the plaintiff's conduct that, aft her husband's death, she and her friends re cognised the mother as the real owner o the estate, and the present claim is a lo subsequent after-thought, not impossibl suggested by some interested speculator as unhappily too frequently the case in India litigation, and we think that the conduct o the parties fairly supplements the evidenc for defendant, and sufficiently establishe that the original estate, which was th *bonâ fide* nucleus of all the rest, wa the mother's estate, and the acquisition of the defendant his own acquisition principally, however, gained after th mother's death upon the estate to whic he succeeded from her. It is here be noticed that the personal propert said by plaintiff to have been left by Mohes Chunder, *i. e.*, of 398 rupees in value, is no proved to have been so left; and that it i admitted that Gooroopershad never ha any real property of that now claimed i his own, nor in the name of any one else, ex cept the two poorahs bromutter. The onl doubt which might be suggested in thi case is regarding two small parcels of lan (the two poorahs or 8 beegahs of land i Bolabita), and a piece of land on whic the mother built a house. It is alleged b

plaintiff that the two poorahs of land were given to Gooroopershad at the time of his marriage; and that the other plot was given to the two boys on the occasion of a *shradh*. There seems to be reason to believe that the two poorahs were enjoyed by Gooroopershad and his wife free from rent, but without a sunnud during Gooroopershad's life: and that, though now entered as paying rent, this land is still held by the defendant. And there is some evidence to the effect that the other piece of land was made over in the name of the boys; and that Koomaree built a house upon it, and thus treated the land, though put in the name of the sons, as hers. Indeed, the witnesses cannot say whose was the real interest and property in this land.

After carefully reviewing all the facts shown by the evidence, we can only conclude that these properties now sued for have all along gone with the rest of the estate, that the estate was during the mother's life treated as the mother's, and that the plaintiff acted entirely as if it were the mother's for a long period after her husband's death; and we further think that the conduct of the parties immediately interested is a fair test in this case, being evidence of family facts long gone by, and that evidence is certainly all against plaintiff's case. We accordingly dismiss the appeal with costs.

We have not in this judgment gone into the discreditable affair of the loss of the papers and before the remand order, of which misconduct the parties mutually accuse one another. The Principal Sudder Ameen is disposed to attribute the loss to plaintiff's acts. But we need only here remark on the inference that do not think that plaintiff has now been materially prejudiced by the loss. It seems to be admitted that there are two bonds for 2,500 rupees each, one being in the name of each of the minor sons of Koomaree Dabea; and the defendant has allowed the plaintiff's vakeel to read from his private copies, and has not contradicted the evidence taken on the former occasion, which the pleader for plaintiff considered most important for his client's case. The plaintiff has, then, had the benefit of that evidence in her favor. We, however, are entirely dissatisfied as to the Principal Sudder Ameen's reasons for not at the time fully inquiring into the circumstances of the loss of the papers.

We think it necessary to remark that the pleading in this case has been conducted before us with a prolixity of argument, and a want of strict adherence to the actual terms in the papers, which, by no means, promote the interests of justice.

The 22nd June 1865.

Present:

The Hon'ble C. Steer and W. Morgan, *Judges.*

Limitation—Deduction of time of pendency of former suit dismissed as not brought in form.

Case No. 69 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Behar, dated the 12th December 1864.

Shah Keramut Hossein, (Defendant), *Appellant,*

versus

Golab Koonwur (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboos Dwarkanath Mitter and *Chunder Madhub Ghose* for Respondent.

Suit laid at rupees 9,540-14 annas, 8 pie.

The present and a former suit were substantially brought on the same cause of action. Owing to the erroneous form in which the former suit was brought, the Court was unable to adjudicate the claim. HELD that the plaintiff was entitled to the benefit of Section 14 of Act XIV. of 1859, and that the time of pendency of the former suit should be deducted from the period of limitation.

IT is in evidence that the defendant in this suit executed a kisbundee bond for 1,200 rupees, upon which a regular suit was brought, and a decree obtained. When the mutiny broke out, the records of this suit and the decree were burnt, together with all the public records. The plaintiff then brought a fresh action to recover the debt due to him from the defendant, basing his cause of action on the original transaction, and not upon the balance of the kistbundee. The High Court threw out this suit, and gave liberty to the plaintiff to sue for any balance which might still be due to him under the former decree and the kistbundee. The suit before us is the suit which the plaintiff has brought in accordance with the view of the High Court; and the Lower Court having found upon such evidence as is now forthcoming, that there was a former decree upon the kistbundee, that it was for rupees 2,685 odd, and that there is neither proof

nor allegation of payment, gave the plaintiff a decree for rupees 4,540-14-8, which, by his calculation, he considered to be the principal and interest due to the plaintiff on his kistbundee.

It is urged, as the first ground of appeal, that the suit is not in time. It certainly is not in time, if the plaintiff is not entitled to have the time, that his other suit was pending, deducted under the provisions of Section 14 of Act XIV. of 1859. We think, however, that he is entitled to this deduction, for, though the other suit was not in form the same as is this suit, the substance of the two suits was the same. Both suits are substantially to recover the debt due to the plaintiff, whether due on the original bond or the subsequent kistbundee bond. The cause of action in both suits is the debt; and, inasmuch as the Court was not able in the other suit, owing to the erroneous form in which it was brought, to adjudicate upon the claim, the plaintiff is, we think, clearly entitled to the benefits of Section 14 of Act XIV. of 1859, and limitation has not, therefore, been incurred.

On the merits, we think that the plaintiff proved his claim by such evidence as the nature of the case allowed. No doubt can exist that he obtained a former decree upon his kistbundee. It is not alleged that this was ever satisfied, and it has been established by the oral evidence of such persons as might naturally be expected to know something of the particulars of the former suit, that the Kistbundee was for 2,100 rupees. To this sum, with the principal added to it, the plaintiff is clearly entitled.

No cause being then shown for any interference with the decision of the Lower Court, we affirm it, and dismiss the appeal with costs.

The 22nd June 1865.

Present:

The Hon'ble C. Steer and W. Morgan, *Judges.*

Hindoo Law (Mitakshara)—Sales by father—Suit by son against father and purchasers—Declaratory decree—Suit necessarily not multifarious.

Case No. 61 of 1865.

Regular Appeal from a decision passed by the Judge of Bhaugulpore, dated the 9th December 1864.

Kanth Narain Sing and others (Plaintiffs), *Appellants,*

versus

Prem Lal Paurey and others (Defendants), *Respondents.*

Baboo Kishen Kishore Ghose and *Mr. R. E. Twidale* for Appellants.

Baboos Juggadanund Mookerjee, Roopnarain Banerjee, Romesh Chunder Mitter, and *Dwarkanath Mitter* for Respondents.

Suit laid at rupees 9,386-4 annas 19 gds.

A son may sue to obtain a declaration that sales by his father without the son's consent are, as against him, void and inoperative to pass or to affect any rights possessed by him in the property; and also that property still in the father's hands is ancestral property, and cannot, therefore, be alienated by the father except under circumstances recognized by the Mitakshara Law as justifying alienation, and with the consent of those whose consent is by that law requisite.

In such a suit by a son against the father and several purchasers, the mere fact of each of the purchasers being concerned only in a portion of the case does not render the suit open to objection on the ground of multifariousness.

THE plaintiff Kishnadhur Sing, a person of full age, has, with his minor brothers, instituted this suit against their father and several other defendants, who have, at various times, it is alleged, purchased portions of ancestral property from the father. The object of the suit is to set aside these purchases as illegal, by reason of the sales by the father having been made for causes which do not, according to the Mitakshara Law which governs this case, enable the father alone to sell.

The plaintiff asks by this plaint to obtain possession of the property sold, and also that a prohibitory order may be made under Section 15 of Act VIII. of 1859 in the plaintiff's favor, regarding the property still remaining in his father's possession.

The Judge has dismissed the suit on two grounds:—

1st. That such a suit for possession of ancestral property during the father's lifetime cannot be maintained.

2nd. That the plaintiffs, having a mere contingent right, are not entitled to sue for an order declaring such right.

From this decision, the plaintiff now appeals.

The decision of 1850 (S. D. Rep., 1850, page 283), on which the Judge relies, is to the effect that a suit for possession and mutation of names as on an exclusive proprietary possession cannot be maintained by

a son during the father's lifetime. It may be inferred from that decision that the Court did not hold the same opinion with respect to a suit to declare illegal the sale by a father of ancestral property without the son's consent. That case is an authority to show that the plaintiffs cannot ask for or obtain sole possession as if they were the exclusive proprietors. But, though the plaintiffs may be unable to obtain the whole relief for which they ask in their plaint, and especially cannot obtain possession of the property, they may yet be entitled to some portion of the relief sought for, and, if they are so, the suit should not have been dismissed.

The decision of the High Court in the case of Mussamut Pranputty Koonwur and others (23rd March 1863), upon which the Judge relies as showing that the plaintiffs are not entitled to a declaratory order, does not govern the present case. It is there said that a person, having a mere contingent right which may never have existence, cannot sue for a declaration of his right under Section 15 of Act VIII. of 1859. The plaintiff there, according to the judgment of the Court, sought for a declaration of his own rights before he had acquired any, and further sought to set aside a document which had no legal force or effect, and to restrain the widow from injuring the estate without showing any grounds for the injunction.

The interest of the son here is not a contingent interest. On the birth of a son, he acquires, by the Mitakshara Law, a vested interest in the ancestral estate, and, on attaining his majority, he is even, in certain contingencies, permitted by the letter of the law, and according to decision also (*see* Stokes's Madras High Court Reports, p. 77), to call for a partition of the ancestral estate. He possesses, therefore, something more than a mere contingent interest. Whatever may be the precise construction of the Section of the Code of Civil Procedure which has been quoted, we think that there is nothing either in that Section or in any rule of law to prohibit a son from maintaining a suit for a portion at least of the relief which is sought for here. The plaintiffs appear to us to have a right to ask from the Court that the sales by their father may be declared (if they can establish this by evidence) to be, as against them, void and inoperative to pass or to affect any right possessed by them in the property sold. They may further be entitled to a declaration, respecting the property still in the father's hands, that it is ancestral property; and that it, therefore, cannot be alienated by the father, except under the circumstances recognized by the Mitakshara Law as justifying alienation, and with the consent of those whose consent is by that law requisite.

The objection urged on behalf of one of the respondents (a purchaser) by his Counsel, Mr. Paul, that the suit is multifarious, must be overruled. The case by the sons against the father is so entire as to be hardly capable of being prosecuted in several suits. The other defendants (the several purchasers) are, it is true, each of them concerned only in some portion of the case stated; but this alone does not render the suit open to objection on the ground of multifariousness. It may probably happen in such a case that the plaintiffs' cause of action (for instance) against the defendants, who are described by Nos. 1, 2, and 3, who purchased a portion of the property in 1855, cannot be conveniently tried together with their cause of action against the defendant No. 10, who bought another portion in 1863; but if this be so, the Court may order separate trials (*see* Section 9 of Act VIII. of 1859).

The suit must be remanded for trial.

The 23rd June 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Agreement to sell—Specific performance of contract—Registration (Act XIX. of 1843).

Case No. 100 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 29th December 1864.

Shib Kishen Doss (Plaintiff), *Appellant,*

versus

Sheikh Abdool Sobhan Chowdhry and others (Defendants), *Respondents.*

Mr. R. V. Doyne and *Baboos Rajendur Misser, Luckhee Churn Bose,* and *Dwarkanath Mitter* for Appellant.

Baboos Kedarnath Chatterjee, Kishen Succa Mookerjee, Banee Madhub Banerjee, and *Unnoda Pershad Banerjee* for Respondents.

Suit laid at rupees 24,200.

A agreed to sell certain property to *B*, and after having received part of the consideration-money, sold the property to *C*

at an advanced price. B, not having in any way neglected to carry out his part of the agreement, was held entitled to specific performance of the contract, and to possession of the disputed property on paying down the cosideration-money.

A deed of agreement to sell at some future period may be registered under Act XIX. of 1843.

THE plaintiff sues to obtain possession of certain landed property, which he alleges that the defendant Abdool Sobhan agreed to sell to him, and for which Abdool Sobhan received, from time to time, portions of the consideration-money, and which he finally sold to the second defendant, Pearee Mohun Soor, at an advanced price.

Abdool Sobhan admits that an agreement had been entered between the plaintiff and himself regarding the sale of this property; and that he had received a sum of 2,500 rupees as earnest-money; and had promised to complete the sale on a certain date; but he denies that any further sums were paid on subsequent dates as plaintiff has alleged; and urges that, as plaintiff did not act up to the terms of the engagement between them, he, defendant, was at liberty to sell, and sold the property to his co-defendant.

The co-defendant answers that his sale, being registered, will take precedence of the plaintiff's deed of sale.

After full consideration of the evidence adduced in this suit, we are of opinion that the plaintiff has fully proved the genuineness of the agreement put in by him, which was denied by the defendant. It is proved by witnesses, and bears the defendant's seal and signature, which the defendant himself did not deny, although he was examined on the trial; and no sufficient reason has been put before us upon which we can conclude that the plaintiff obtained any advantage by substituting a false agreement for the real one, nor is there evidence of any other. The evidence, in our opinion, also clearly proves that the plaintiff, from time to time, informed the defendant, Abdool Sobhan, of his readiness to complete the contract, and paid him portions of the consideration-money, and finally lodged at his (plaintiff's) attorneys' the balance of the consideration-money, and gave the defendant notice of this fact, and that he would require the defendant to complete the contract. Abdool Sobhan, in his verified statement, does not allege any cause for the delay in the first instance in the execution of the deed of sale. But the deed itself states that that cause was the absence of the title deeds, and the necessity for the enquiry into the correctness of the amount of profits stated by the defendant to be obtained from the estate, and the deed gives the plantiff the option of relinquishing the engagement, if the title-deeds are found to be defective; and also lays down the principle upon which the consideration to be paid for the property is to be increased or decreased according to the result of the Mofussil enquiry into the profits of the estate. There is no evidence to prove that the defendant took any measures to bring the negotiation to a termination on the terms conditioned; and even if, for argument's sake, we admit that the plaintiff was the person bound to seek his vendor, we think that he has clearly proved that he did all which could be required of him, and that he is, therefore, fully entitled to have the agreement which the defendant entered into with him carried out.

The Principal Sudder Ameen has decided against the plaintiff, because he did not "cause "the deed of sale to be executed by paying "the money within the prescribed period." But it is evident from the contract itself that time was not of its essence. A certain date was fixed in it, upon which it was expected that the parties would be in a position each to carry out his part of the contract; but the essential items were that the defendant should satisfy the plaintiff as to the title-deeds, and as to the profits of the estate before the deed of sale was prepared, and the plaintiff required to put in the balance of the consideration-money. Now, it is not shown to us that the defendant at any time even intimated that he had the title-deeds ready to submit to the plaintiff's inspection; and the Mofussil enquiry appears never to have been completed. It is said that the plaintiff was bound to make that enquiry. But the first requisite was that the defendant should produce his village accounts, and depute his amlah to accompany the plaintiff's amlah to the village. The plaintiff could not alone, or from his side, have instituted any such enquiry.

We think on the evidence that the defendant Abdool Sobhan, having received certain sums of money as an advance on the consideration-money, has finally played the plaintiff false on obtaining an offer of a larger sum from a third party, his co-defendant, for the property. We think also that the plaintiff has not in any way neglected to carry out the agreement which the parties entered into; and that he is, therefore, entitled to specific performance of the contract, and to obtain possession of the disputed estate on paying down the correct amount of consideration-money, unless the co-defendant can show a better title.

Now, on this point, it is proved that Pearee Mohun Soor received direct notice of the defendant's contract with the plaintiff, and the determination of plaintiff to enforce that contract. But it is said that the registry of his deed of sale under Act XIX. of 1843 invalidates the plaintiff's agreement. To this it is replied, *first*, that the law in question is applicable only to deeds of the same character, *i. e.*, as between two deeds of sale, or two deeds of mortgage; whereas the plaintiff's deed was not a deed of sale, but an agreement to sell at some future period—a deed which, under Regulation XVI. of 1793, could not have been registered, not coming within the classes of deeds which, under that Regulation, were allowed to be registered. And, secondly, it is said that Act XIX. of 1843 applies, as regards deeds of sale, solely to cases where no notice of the prior deed has been given to the party who entered into the subsequent deed, as proved by the fact that, as respects mortgages, it is especially enjoined that the question of notice shall not affect the priority of the registered mortgage, whereas no such clause is added as respects deeds of sale.

We have some doubts upon the first point; but we incline to the opinion that the deed of the plaintiff might have been registered. It was in law a deed of sale, and under its own terms was, in certain contingencies, to be considered a deed of sale. Upon the second point, we think that the clause regarding notice must be applicable to both deeds of sale and mortgage. But each case must stand or fall upon its own merits, and the law must not be construed so as to confirm or support a fraud. In this case, the act of the defendant Pearee Mohun Soor, in purchasing from Abdool Sobhan, when he was fully aware that Abdool Sobhan was at the time only a trustee holding for the plaintiff under the terms of his prior engagement with plaintiff, was substantially in fraud. His deed of sale was not authentic, being granted by a person who had no authority to to grant it, as Pearee Mohun Soor fully knew.

We reverse the decision of the Principal Sudder Ameen, and remand this case in order that the Lower Court may, after proper enquiry, fix the amount of consideration-money due from the plaintiff under the terms of his deed, and award him possession on payment of that sum. All costs of litigation incurred by plaintiff will be paid by the defendant, Abdool Sobhan. Pearee Mohun Soor will pay his own costs.

The 23rd June 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Hindoo Law (Mitakshara)—Widow (Right of—to dispose by will of immoveable property inherited from her husband)—Streedhun.

Case No. 27 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Patna, dated the 31st December 1864.

Goburdhun Nath (Defendant), *Appellant,*

versus

Onoop Roy and others (Plaintiffs), and Sheo Churn Singh and others (Objectors), *Respondents.*

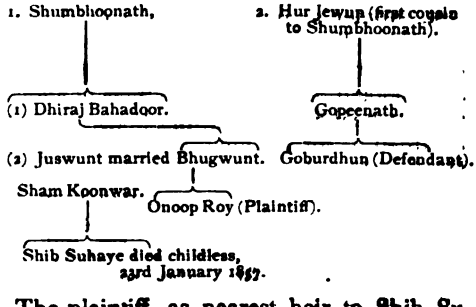
Baboos Dwarkanath Mitter and *Kalee Prosunno Dutt* for Appellant,

Baboos Unnoda Pershad Banerjee, Debendro Narain Bose, Kishen Succa Mookerjee, Tarucknath Sein, and *Roopnath Banerjee* for Respondents.

Suit laid at rupees 49,883, 5 as., 2 pie.

A widow has no power to dispose by will of immoveable property inherited by her from her husband. The word "inherited" used in the Mitakshara in regard to a woman's *streedhun* does not include immoveable property so as to make it her *peculium*, but refers only to personal property over which alone she has absolute dominion.

THIS is a suit, in order to understand which the position of the family is subjoined :—



The plaintiff, as nearest heir to Shib Suhaye, who was the son of his great uncle Juswunt, sues to recover certain real and personal property, and to set aside a will, whereby Goburdhun claims to hold the same as having received it from Mussamut Sham Koonwar, who, as a widow, took the property after the death of Shib Suhaye.

The authenticity and genuineness of the will are not impugned; but the legal power of the testatrix is violently contested by the plaintiff; and the Lower Court has, in effect,

decided that the testatrix, under the circumstances, had no power to make such a will, inasmuch as it was against Hindoo Law for her to do so.

The defendant had also claimed the property as a *kurta puttro*, or adopted son; but it is not necessary for us to enter on the consideration of this matter, inasmuch as the power of the testatrix to make the will is the point by which the case must stand or fall.

If the will is invalid and illegal, then the defendant cannot take, even though he be admittedly the adopted son of Sham Koonwur. If the will is one which the testatrix could make by Hindoo Law, the plaintiff is out of Court, whether the defendant be or be not the adopted son.

The case has been most fully argued, and the cases and books named in the margin* have been cited on both sides.

The passage in the Mitakshara is that most relied on by the defendant, where, in addition to the six kinds of inheritance mentioned by Manu, the author adds: "Property which she may have acquired by inheritance, purchase, partition, seizure, or finding, is denominated, by Manu and the rest, women's property." Now, the property in dispute unquestionably came to the testatrix by inheritance, and if the passage quoted is to be taken absolutely and without qualification—if, in short, it is to be regarded as an undoubted exposition of the Hindoo Law binding on all parties whose claims are regulated by the Mitakshara, and of universal application—the defendant would seem entitled to retain the inheritance.

On the other hand, the author of the Mitakshara clearly goes far beyond Manu in extending *streedhun*, and Macnaghten at page 38, Volume I., in treating of this very subject, says: "In the Mitakshara, whatever a woman may have acquired, whether "by inheritance, purchase, partition, seizure, "or finding, is denominated woman's property, *but it does not constitute her peculium.*" What authority there is for the latter part of this sentence is not stated, though the learned author may have rested on analogy; but it is, on the other hand, quite certain that the defendant cannot show that the extended doctrine of the Mitakshara which goes so much beyond Manu, and which would give widows an absolute dominion over all property devolving on them by inheritance, has ever been acted on in any one case.

Once, indeed, the point was directly raised in the case quoted of 1847, page 89. and in a form which is absolutely identical on all points with the present case. The same passage from the Mitakshara was then cited and the same contention raised as to whether the succession was "as *streedhun*" (a woman's own property) or as "merely holding a life-interest in it." The Court, however after alluding to the point, never decided it and neither this decision, nor any other quoted, gives us any real assistance in solving the difficulty.

In the other cases, it is laid down that a woman only inherits a share of her husband's ancestral property, and that for life, whenever the same had been held in severalty; while, if the property is still joint, she has only a right to maintenance. Other points bearing on the state of widows have also been decided—such, for instance, as that a widow cannot alienate a share in a village devolving on her from her husband (Vol. II., p. 320, Select Reports), but none which have an immediate bearing on the question now at issue.

We are of opinion that looking to the entire absence of proof that the doctrine relied on by the appellants has ever been carried out, the words of the passage in the Mitakshara ought to be taken in their strict and literal, and not in their apparent legal sense. The property devolving by inheritance on a woman must be looked on as her property indeed for the time during which she enjoys it, but not as her *peculium*; not, in short, as her *streedhun* in the sense in which that word is used in Manu is understood by Macnaghten, and is generally interpreted in our Courts. This ruling will be consonant to universal custom elsewhere than in places governed by the Mitakshara, and, as we shall presently see, to the spirit and intent of the Mitakshara, as well as to the maxims of Hindoo society which are generally understood and enforced. Nor does the passage in the Mitakshara, we must observe, though so much relied on, exactly tally with what follows in some and in other chapters as to the succession to property left by woman.

We think that the limitation just put on the word "inherited" is borne out by pas-

* Mitakshara (Colebrooke), p. 365, Section 21, verses 2 and 3.
Macnaghten, Vol. I., pp. 19, 20, 39, and 46.
Strange, Vol. I., pp. 30, 137, 246, Vol. II., p. 253.
Manu, Chapter IX., p. 194.
Sudder Dewanny Adawlut, Select Reports, Vol. II., p. 320.
Sudder Dewanny Adawlut, Select Reports, Vol. VII., pp. 22 and 26.
Sudder Dewanny Adawlut, 1847, p. 89.
Moore's Reports, Vol. VIII., Section 29.
Vivada Chintamonee, Sections 9 and 12.

ages from Strange's Hindoo Law, which work has been cited by the appellants' pleaders in support of their case. In the Chapter on Inheritance, Volume I., page 137, Edition of 1830, he says: "It may be here "noticed that the widow has not the same "dominion over property inherited from her "husband that she has over her *streedhun* "emphatically called 'women's property,' "as has already been seen in a former chap-"ter; as also the descent of the one and of "the other is different, as will appear in the "Chapter on Widowhood."

Again, in the Chapter on Widowhood, Volume I., page 246, is the following passage: As to her property—her right of inheriting to her husband, and, that not attaching, her claim to be maintained by his representatives, having been discussed in a former chapter, it remains to treat of her power over what she has, and to show how it vests at her death, distinguishing between what she possesses in right of her husband and her *streedhun* which, as has been seen, is more emphatically her own. With respect, not only to what she may have inherited from her husband, but to its accumulated savings also, her duty is to regard herself as little more than a tenant for life and trustee for the next heirs of property so possessed, being, as already intimated, restricted from aliening it by her sole independent act, unless for necessary subsistence, or purposes beneficial to the deceased. If in anything she may take liberties with it, it is in making pious and charitable gifts, with presents to her husband's relations and dependants, but not to her own, without their assent; the concurrence of her legal guardians and advisers, as well as her husband's heirs, being generally necessary to any alienation by her of such property: by heirs being meant, not the immediate ones only, but the whole living at the time; their assent to be manifested by their attesting the conveyance or by other expression of it in writing. The restriction, however, in the extent stated, seems to concern land only, with this difference between the Bengal and Benares Schools, that the former confines it to such as has been derived from her husband; the latter prevailing to the Southward, to land held by her under whatever title; the law also requiring a deed and *seisin* to perfect the transfer. Whereas, with regard to moveables (slaves excepted, that are considered as land), she has a greater latitude, reserving always one-half for the "due performance of his funeral obsequies. "And her *streedhun* being peculiarly hers, "whatever falls under this description "would seem to be not only hers, without "reserve for present use, but to be at her in-"dependent and uncontrollable disposal."

In Volume II., page 253, of Strange, we have an extract from Colebrooke's Translation of the Mitakshara, in which the following words occur: "On failure of de-"scendants down to the son's grandson, "the wife inherits; and she, *having re-"ceived her husband's heritage*, should "take the protection of her husband's "family or of her father's, and should "use her husband's heritage for the sup-"port of life, and make donations and "give alms in a moderate degree for the "benefit of her deceased husband, *but not "dispose of it at her pleasure like her "own peculiar property*." And the cases cited at pages 407, 408, and 409 of the same volume support the view of the case we have taken above, that the widow's right over the property inherited from her husband is restricted. We think it to be clear, therefore, from the above passages, that the word "inherited" used in the Mitakshara, in regard to a woman's *streedhun*, cannot, and ought not to, include immoveable property inherited by her from her husbands; but that it probably refers only to moveables over which a widow appears to have control. Had the law been otherwise, and were *everything* which a woman *inherited* to become her *streedhun*, and, as such, at her own disposal, how is it that such doctrine has remained in abeyance to this day, and has never been declared the law in Madras, where the Mitakshara prevails as the Law of Inheritance; nor been attempted to be urged in the many appeals which have come before Her Majesty's Privy Council in which the succession has been disputed.

In the translation of the *Vivada Chintamonee*, lately made by Baboo Prosunno Coomar Tagore, we have a table of succession from the Mitakshara and other works of authority on Inheritance. In Section XI. we find that "a widow *inheriting* her husband's "property can enjoy it for life, but cannot sell "or make a gift of it at her pleasure;" and again in Section XII., "any property "which a woman *inherits* is her *streedhun*, "that is, peculiar property. Hence any "property of her husband which she *inherits* "shall, on her death, be received by the heirs "of her peculiar property. But such pro-

"perty cannot, according to the *Sunitisara*, "be her *streedhun*. Hence the heirs of her "husband shall receive it." These passages appear at first to be contradictory; but at pages 261 and 262 of the same work, we have some explanation, which helps to clear the difficulty, and it lays down the rule that a woman may dispose of moveable property inherited from her husband, but not of immoveable. Section XII., moreover, as quoted above, merely describes the course of succession, but does not contradict the rule laid down in Section XI. that a widow cannot *make a gift of it*. All the schools, therefore, appear to concur in this point, as regards immoveable property inherited by a widow from her husband, she has nothing but a life-interest, and cannot dispose of it except under peculiar circumstances and under certain restrictions. We think, therefore, that the word "inherited" used in the text of the Mitakshara must be certainly limited to personal property which a woman inherits, and does not extend to immoveable property so as to constitute it her *peculium*.

In this view, then, we can find no reason to alter the judgment of the Lower Court; and on these grounds, holding the will illegal and invalid, we dismiss the appeal with costs.

The 26th June 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Suit for shares in ancestral property—Joint or separate holding immaterial.

Case No. 593 of 1865.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 14th December 1864, reversing a decision passed by the Sudder Ameen of that District, dated the 10th June 1864.

Koonwar Narain Nundee and others (Plaintiffs), *Appellants,*

versus

Gocool Churn Dey and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Hem Chunder Banerjee* for Appellants.

Baboos Romanath Bose and *Baneenath Bose* for Respondents.

Shares in ancestral property may be sued for, whether they are held jointly or separately.

THE decision of the Judge in this case must be reversed. He has dismissed the plaintiffs' claim to their shares in their a cestral property, not because they are n entitled to such shares, but because he con ders that they sued for the shares as sep rate property, whereas they in reality he them *joint* with the other members of t family. The plaintiffs would be entitled a decree whether they held them joint separate; and we, therefore, reverse t Judge's decision, and restore that of the fi Court.

The respondent will pay all the costs this suit.

The 27th June 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Ka *Judges.*

"Recognized Agents" in Section 17, Act VI of 1859.

Case No. 37 of 1865.

Regular Appeal from a decision passed by th Second Principal Sudder Ameen of th 24-Pergunnahs, dated the 29th Decemb 1864.

Prannath Chowdhry (Defendant), *Appella*

versus

Ganendro Mohun Tagore and others (Plai iffs), *Respondents.*

Baboos Sreenath Doss and *Motee Loll Mook jee* for Appellant.

Baboos Juggadanund Mookerjee and *Bu shee Doss Seal* for Respondents.

With reference to Section 10 of the Charter of t High Court, it was held that a "Recognized Agent" described in Section 17, Act VIII. of 1859, has not th option of addressing the Court as the suitor himse may do, and that no one but Advocates and Pleade can be allowed to plead.

[The former part of the judgment is omitte as turning purely on facts.]

WE have been requested to notice an a plication made by the Reverend Kish Mohun Banerjee, the recognized agent for t respondent, for permission to address t Court in answer to the appellant's pleade He pointed to the words in Section 17 "an "anything which by this Act is required "permitted to be done by a party in perso "may be done by his recognized agent," a giving him the option of addressing the Cou as the respondent himself might have don had he been present. On reference, howeve to Section 10 of the Charter of the Hig Court, we think the following words a

clusive against the application: "And no person *whatsoever* but such *Advocates* or *Vakils* shall be allowed to plead for or on behalf of any suitor in the said High Court; and no person or persons *whatever* but such Vakeels or Attorneys-at-Law shall be allowed to act for any suitor in the said High Court, except that any suitor shall be allowed to appear, plead, or act on his own behalf, or on behalf of a co-suitor." The application was accordingly disallowed.

The 28th June 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Jurisdiction—Suit to recover money deposited to be applied to rents.

Case No. 697 of 1865.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 28th December 1864, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 16th April 1864.

Babee Golam Singh (Plaintiff), *Appellant,*

versus

Chunder Kant Mookerjee and others (Defendants), *Respondents.*

Baboo Luckhee Churn Bose for Appellant.

Baboos Sreenath Banerjee and *Chunder Madhub Ghose* for Respondents.

Suit to recover money deposited with the defendants to be applied in payment of rents (the deposit having unsuccessfully pleaded in a suit for rent) lies in the Court, and not before the Collector.

In this case it appears that the plaintiff alleges that he deposited a round sum of money with the defendants to be applied to the rents of certain estates. The deposit was pleaded when a suit was brought for the rent of some of those estates; but the Revenue Authorities refused to consider it, as the respondent did not state what amount was to be credited to each estate. The plaintiff, therefore, now sues to recover the amount deposited.

The Judge on appeal has held that the suit will not lie before the Civil Courts, but must be preferred before the Collector.

We think this decision wrong. There is no Section of Act X. of 1859 under which such a suit could be taken before the Collector. But it is said that the plaintiff should have appealed against the decision in the rent suit, and not have brought a separate action. It is true that the plaintiff might have appealed; but, as the first Court did not try the disputed question as to the deposit, there is no bar to his adopting the procedure of bringing a new suit to recover the sum paid, if he prefers that mode of action.

The decision of the Judge is reversed, and the case remanded for trial on the merits.

The 29th June 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Costs—Discretion of Lower Court (Interference with).

Case No. 509 of 1865.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 14th December 1864, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 18th December 1861.

The Government (Defendant), *Appellant,*

versus

Maharajah Mahatab Chund Bahadoor (Plaintiff), *Respondent.*

Baboo Kishen Kishore Ghose for Appellant.

None for Respondent.

A Superior Court should give some reason for interfering with the discretion of a Lower Court as to costs.

THE first Court gave Government its costs as having been unnecessarily brought into Court.

The Lower Appellate Court (the Judge, Mr. Fletcher) charged Government costs, but gave no reason or shadow of a reason for differing with the first Court.

As the rule is that, when a superior interferes with the discretion of a Lower Court as to costs, it should give some reason for doing so, we reverse this decision.

The respondent, being duly called, did not appear. Special appeal decreed with costs.

The 29th June 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Sale in execution of decree—Prior lien—Subsequent encumbrance.

Case No. 89 of 1865.

Regular Appeal from a decision passed by the Additional Judge of Jessore, dated the 11th January 1865.

Mr. J. Beckwith (Defendant), *Appellant,*

versus

Umesh Chunder Roy (Plaintiff) and others (Defendants), *Respondents.*

Mr. A. F. Lingham and *Baboo Mutty Lal Mookerjee* for Appellant.

Baboos Sreenath Doss and *Bungshee Dhur Sein* for Respondents.

Suit laid at rupees 2,230.

U obtained from *G* a mortgage on a putnee talook previously pledged to *P* by *G's* father *C* as security for the rents of another property leased to *A*. *U's* mortgage-debt not having been paid, notice of foreclosure was issued, and *U* was about to take possession, when the property was sold in execution by *P* with notice of *U's* mortgage, and purchased by *B*. *U* now sues to set aside the sale. HELD that the lien on the property obtained by *P* and, through his sale in execution, by *B* had a legal priority over *U's* mortgage, and that the sale was not in execution of a mere money-decree.

THE facts on which this case turns are little, if at all, disputed, and we find them to be as follows:—

The plaintiff, Umesh Chunder, obtained from Gunesh Chunder Chuckerbutty a mortgage on a putnee talook, which is the property now in dispute, on the 5th of Posh 1264. On the 16th of Choitro 1267, the money for which the mortgage was created not having been paid, notice of foreclosure was issued, and the plaintiff would have taken possession, but just then the property was sold at the execution of Rajah Prosunnonath, and purchased by the defendant, Mr. Beckwith, in the name of Dinonath Patali.

Now, the Rajah had had this very putnee estate pledged to him by Chundee Churn, the father of Gunesh Chuckerbutty, as security for the rents of another property leased to Ashootosh Chatterjee. This was in Assin 1260, or September 1853. When this person failed to pay his rents, the Rajah sued him, as well as Chundee Churn, the security, for his money, and got a decree, and, in pursuance of his decree, the property was put up to sale, as we have seen, with noti of the plaintiff's mortgage, and was pu chased by the appellant before us.

The question at issue before us, and i deed before the Lower Court, resolves its into this—Has the lien obtained on the pr perty by the Rajah, and, through his sale i execution, by the appellant, a legal priori over the mortgage obtained by Umes Chunder, the plaintiff?

The Judge rules that it has not, and th the plaintiff is entitled to possession, becau another mortgage to one Dinobundhoo w in existence prior to the sale and purcha by the appellant, and that the claim of Di bundhoo on the property was transferred Umesh who cleared off the first encum brance, and became himself entitled to su ceed in virtue of the transfer.

But this reasoning is obviously wrong, an is founded on an incorrect appreciation the facts. Had this been the case, Umes would have certainly foreclosed on the ori ginal mortgage of Dinobundhoo, and woul have been compelled to foreclose after com mencing proceedings *de novo*. The year o grace in Dinobundhoo's case had all be expired. Had Umesh Chunder purchase in reality this person's rights, he would ha foreclosed in a few days after his purcha It is, therefore, clear to us that the Judge decision cannot be supported on any su grounds as he has recorded.

The plaintiff, respondent, however, rel on certain decisio of this Court to th effect that a pu chaser at a sale i execution of a mer money-decree cannot claim a priority over an lien or encumbrance subsequently created t the property in good faith. It is urged th the appellant only purchased the rights of th debtor, and cannot be in a better positio than his vendor.

No. 2902 of 1864, decided 29th of March 1865.

Full Bench, 14th of December 1864, 315, Weekly Reporter.

We find, however, that the Rajah, by th deed from Chundee Churn, obtained a di tinct lien on this property, and an assuranc that no other encumbrance or lien would b created thereon. That deed was duly regi tered. The security, as well as the actu defaulter for rents, was made a party to t suit which followed, and, though no speci mention was made of the property in th decree which followed, there can be no dou of the existence thereon of a prior encu brance created in perfect good faith.

The judgment of the Full Bench of De-mber last, on which so much stress is laid r the plaintiff, and which, of course, we cept as binding, if the facts are the same, ys that a person with a simple money-cree is not entitled to execute the same inst the property in the hands of a sub-quent purchaser. But, in this case before , the decree-holder is not seeking to exe-e at all, and the property has not reached hands of a subsequent purchaser. The cree has taken effect against the property dged for the debt ; and, though the decree not specifically recite that the property question was liable for the debt, yet, from filing of the deed in the suit, and from presence of the parties, both the defaulter d the security, we cannot avoid the nclusion that the property was put up and d, not as that of an ordinary debtor, but what had been avowedly pledged for the bt. In fact, we cannot treat the Rajah's as ere money-decree.

In this view, the prior encumbrance uld be valid, and the purchaser would quire a good title. The facts disclosed in decision of the Full Bench of December em to us different, and this case not to come thin that ruling.

Our view is further strengthened by Mac-rson on Mortgages, page 86, which gives riority to prior encumbrances such as the esent. There is no doubt that the Rajah, d he taken possession of the property dged, would have acquired a sound title, od against subsequent encumbrances.

All things considered, we hold that the ellant has made a good and valid pur-se, and that his lien ought to be main-ed.

In this view, we reverse the decision of Judge, and decree the appeal with all ts.

The 30th June 1865.

Present :

e Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

s Probandi—Receipt of consideration on ad-itted bond—Payment under a letter of as-ignment—Jurisdiction (of Civil Court)—Suit for profits of estate appropriated by wrong-doer.

Case No. 70 of 1865.

egular Appeal from a decision passed by the Deputy Commissioner of Hazareebaugh, dated the 14th January 1865.

Tekaet Roop Mungul Singh (Defendant), *Appellant,*

versus

Anund Roy (Plaintiff), *Respondent.*

Baboos Chunder Madhub Ghose and *Mohesh Chunder Chowdhry* for Appellant.

Mr. R. T. Allan and *Baboo Unnoda Pershad Banerjee* for Respondent.

Suit laid at rupees 7,230-10 annas.

Where a defendant admits execution of a bond, but denies receipt of consideration, the *onus* of proving receipt is on the plaintiff.

Where a defendant admits having written a letter of assignment directing the plaintiff to pay certain sums of money due by the defendant to third parties named in the letter, the plaintiff is bound to prove such payment.

A suit for profits of property alleged to have been appropriated by a wrong-doer is cognizable by the Civil Court, and not the Collector.

THIS is a suit to recover the sum of rupees 17,567-6-10, the said sum being made up of five items.

The Lower Court decreed the whole of the first item, a bond-debt. The second item, a sum due upon a letter of assignment, was decreed in part. The claims to the other items were dismissed, the Lower Court holding that the plaintiff had not proved his claim in one item, and that, with reference to the remaining items, the Court had no jurisdiction, inasmuch as they involved claims exclusively cognizable by the Collector.

Both parties appeal; the defendant is dissatisfied with the decree of the Lower Court in the matter of the bond-debt and the sum awarded under the deed of assignment.

The plaintiff appeals, urging that the Court below was wrong in not awarding the whole of the second and third items, and further that the Court had jurisdiction to try the plaintiff's claim to the fourth and fifth items, inasmuch as the claim was not for rent, but for profits of an estate appropriated by a wrong-doer.

The first point argued by the pleader for the defendants was, that the suit was barred by the Statute of Limitations, Act XIV. of 1859. On this point, we observe that the said Act was extended to Hazareebaugh, a Non-Regulation Province, by public notification, dated the 3rd of February 1861. The present suit was instituted well within two years from date of the aforesaid notification, and is, therefore, with reference to the provisions of Section 24 of Act XIV. of 1859, clearly within time.

The next point taken by the pleader for the defendant is that, as the receipt of the

consideration of the bond has not been proved, the claim of the plaintiff should have been dismissed. The Deputy Commissioner, in his decision, observes that, "as regards the consideration given," he considered "the proof to be very bad;" and further that this proof would have been entirely rejected by him, but for the acknowledgment of the defendant that he executed the bond.

It appears to us very clear that there is no reliable evidence that the defendant received any consideration under the bond. The parties stood in the position of master and servant; the defendant being the master, he admits execution of the bond, but has all along and consistently denied receipt of any consideration. The pleaders on both sides here entered into an argument as to upon whom the *onus* lies in a case where a defendant admits execution of a bond, but denies receipt of consideration. The pleaders for the defendant contend that the plaintiff is bound to satisfy the Court that consideration passed. The pleaders for the plaintiff contend that the *onus* of proving the negative is on the defendant.

The decision of the late Sudder Court published in part 2 of the decisions of 1860, page 29, is applicable to this case. We hold that the *onus* is on the plaintiff. The decision of the late Sudder Court, dated the 30th July 1858, Maharajah Shumboonath Singh, defendant, appellant, *versus* Gour Buksh Sahoo and others, plaintiffs, respondents, does not, in our opinion, apply to this case: for in that case the Rajah attempted to avoid the legal effect of his admission that he had executed the bond, by an averment that the consideration was an untrue one, entered solely with the view to evade the penalty attached to a clear infraction of the Usury Laws.

In the present case, the defendant simply denies receipt of any consideration. The *onus* of proving this receipt was on the plaintiff, and he has wholly failed to do so. We reverse the decision of the Lower Court in the matter of the first item of claim, *viz.*, the bond-debt, with costs and interest of both Courts in proportion to the amount which this item bears to the aggregate amount of the whole of the item claimed.

We now come to the second item of the plaintiff's claim. Both parties are dissatisfied with the decision of the Lower Court. The defendant urges that there is no proof that any portion of the sum covered by the letter of assignment was paid to the assignees. The plaintiff contends that there is such proof, and that the Lower Court should have decreed the whole sum of which the item was made up, and not a portion of it.

The defendant admits that he wrote the *burat puttro* or letter of assignment directing the plaintiff to pay certain sums due by the defendant to third parties who are named in the letter. The plaintiff is, therefore, bound to prove that he paid those third parties. It appears that he filed no receipts of payment: he contented himself with examining one witness by name Hooli Mahtoo, the brother of one of the parties named in the letter of the assignment. The Court below very properly dismissed the plaintiff's claim against the defendant for such portions of the item for which he could produce neither the receipts of the assignees nor oral evidence of payment; but we think the Court was wrong in decreeing a sum of rupees 616-5 solely on the evidence of the brother of one of the assignees. The receipts of the said assignees were not produced, nor was the assignee examined, or evidence given that he could not be produced. We, therefore, reverse that portion of the decision of the Lower Court, and decree that the plaintiff's suit for the whole of the second item be dismissed with costs and interest of both Courts.

With reference to the third item of the claim, we think that the decision of the Lower Court is a just and proper one. It appears that the defendant executed a "*burna*" lease to the plaintiff of several villages. It was stipulated that the plaintiff was to pay the Government revenue; and that from the usufruct he was to re-pay himself the money advanced to the defendant. It was calculated that, after paying the Government revenue, which amounted to some 600 rupees, there would be surplus assets of 2,200 rupees available for the payment of the plaintiff's claim. On the representation of the plaintiff that such was not the case, the defendant agreed to lease out four other villages with assets yielding about 600 rupees, or sufficient to pay the Government revenue, and to leave a margin, as originally agreed upon, of 2,200 rupees. These four villages the plaintiff never obtained possession of. He, therefore, could not pay the Government revenue; and, had the defendant neglected to do so, we should have held that the plaintiff was endamaged, and entitled to recover. But it is admitted that the defendant did pay the Government revenue, and that plaintiff did realize the full amount of assets agreed upon, *viz.*, rupees

oo in liquidation of the debt. For these ons we concur with the Court below in ding that this claim is wholly inadmis-e.

ith reference to the third and fourth s of the claim, we are of opinion that Lower Court has erred in holding that d no jurisdiction. The claim is not for but for profits of certain properties h, it is alleged, have been appropriated wrong-doer; such a suit is clearly cog-le by the Civil Court. The suit must, fore, be remanded for trial of these two of the claim.

e result of our decision is that we e the appeal of the defendant with costs nterest, and reverse the decision of the r Court with reference to items Nos. 1 . We dismiss the cross-appeal of the iff with reference to item No. 3, and d the suit for the trial of items Nos. 4 of the claim.

The 30th June 1865.

Present:

lon'ble J. P. Norman and F. B. Kemp, *Judges.*

ion of review—Admission of—after pre-scribed time.

Case No. 125 of 1865.

ation for review of judgment passed Justices Norman and Kemp, on the 6th y 1864, in special appeal No. 1713 of 3.

nrao Sing (Defendant), *Appellant,*

versus

ngula Beebee (Plaintiff), *Respondent.*

Mr. C. Gregory for Appellant.

Baboo Kishen Succa Mookerjee for Respondent.

ition of review ought not to be admitted after prescribed in Section 377 of Act VIII. of 1859, the leave of the Court or a Judge.

decision in this case was given on h of May 1864. The petition of was filed on the 23rd of March in esent year, ten months and seventeen fter the date of the judgment.

are of opinion that this practice is ; that under Rule 1 of the 1st of May and the 377th Section of Act VIII., ion of review ought not to be admitted the time prescribed in that Section the leave of the Court or a Judge.

As to the present application for review, there was never any ground for a special appeal.

The Judge, confirming the decision of the Moonsiff, had held that the instrument set up by the defendant was never executed by the plaintiff—in fact, that it was fraudulent, and probably a forgery.

The application for review is rejected.

The 30th June 1865.

Present:

The Hon'ble W. S. Seton-Karr and G. Campbell, *Judges.*

Limitation—Cause of action—Effect of Judg-ment of Court which corrects a legal mis-apprehension.

Case No. 464 of 1864.

Regular Appeal from a decision passed by the Judge of Patna, dated the 21st Sep-tember 1864.

Syed Lotf Ali Khan (Plaintiff), *Appellant,*

versus

Afzuloonissa Begum and others (Defendants), *Respondents.*

Mr. G. C. Paul and *Baboo Mohendro Lall Shome* for Appellant.

Messrs. R. V. Doyne and *R. T. Allan, Moonshee Ameer Ali,* and *Baboo Kishen Kishore Ghose* for Respondents.

Suit laid at rupees 1,33,970.

A judgment of a Court altering a pure legal misap-prehension as to rights and *status* between *A* and *B*, and passed in a suit to which *C* was not a party, is not binding on *C*, nor will it give *A* a right to bring a fresh suit in order to put him in the position in which he would have been had he never misconceived his correct legal claim.

THE facts in this case are not denied, and the appeal arises out of the following cir-cumstances:—

The plaintiff and other shareholders in the same family lent to the Rajah of Durbhanga a large sum of money on a bond, dated the 21st July 1849. The sum lent amounted to 3,34,812 rupees. On the 25th December 1856, the Rajah made a payment of 2,00,000 rupees, which was received by the defend-ants, and appropriated as their share of pay-ments, with the knowledge and the acquies-cence of the plaintiff. Subsequently, all the shareholders instituted separate suits against the Rajah for the recovery of their separate shares of the money lent. These suits were

tried by the Judge, Mr. Russell, at one and the same time, and were decided on similar grounds. The Rajah was cast in large sums; but the plaintiff, appellant before us, appealed to the High Court to obtain more than what had been decreed to him. The defendants, who had obtained from the Judge more than they had asked for, did not so appeal.

The exact position of the parties in the family is as follows :—

Mir Abdoollah married Ameeroonissa.

Kasim Ali, the defendnat.	Mehndee Ali, the defendant.	Lotf Ali Khan, (Plaintiff).

The share of Ameeroonissa being by Mahomedan Law 3 sahams, she made a present of the same to Lotf Ali, and he being entitled in his own right to 7 sahams, thus became the owner of 10 sahams of the family property. The other brothers, Kasim and Mehndee, being entitled to 7 sahams each, their representatives, the defendants in the present suit, thus claim 14 sahams out of the whole 24; and ther respective claims on the Rajah for his debt on the bond were consequently of the above amount.

It is most important to notice that, in the separate suits brought by the shareholders as above mentioned, the defendants deducted the sum of two lacs paid in December 1856 by the Rajah, as received, to their several receipt; while the plaintiff, in his suit, made no such deduction, thereby showing that up to that time he had considered the two lacs as paid to the sole credit and receipt of the other shareholders.

The result of the appeal to the High Court by the plaintiff Lotf Ali was that on the 14th of December 1863, our colleagues, Justices Bayley and E. Jackson, ruled that the sum of two lacs "was paid "in liquidation of the whole sum due on the "bond not with reference to any parti-"cular share or interest in it." The learned Judges further ruled that the said sum was first to be credited to interest, and not to principal, as the Rajah, respondent, wished, and the Judges ended by amending the decree of the Lower Court, and awarding the plaintiff a sum of 2,53,480 rupees, being short of his total demand of 2,79,010 by 25,530 rupees.

The plaintiff now sues for his 10-24th share of the sum paid by the Rajah to the credit of the defendants on the 25th of December 1856, alleging that share to amount to rupees 88,333-5-4, and taking the decision of the Judge, Mr. Russell, of the 21st of Se tember 1861, as amended by the High Co on the 14th December 1863, to be his stan point.

The present Judge, Mr. Ainslie, has go very fully into the case, and has recorded elaborate decision, of which we find the follo ing to be the main features :—

The Judge admits that, up to the d of the institution of the several suits ag the Durbhanga Estate, all parties w acting on a clear and distinct un standing as regards the appropriation of shares; and that it was not from error negligence that the plaintiff refrained fr claiming his share of the two lacs. But Judge argues that the decisions of Septe ber 1861 and December 1863 put the mat on an entirely new footing, changed position, created a fresh obligation on part of the defendants, and vested in plai iff a new right to sue. The Judge a says that the plaintiff is entitled to dedu the time during which the former action wa pending, and that he would thus be in time. Acting on these impressions, the Jud next proceeds to consider the effect of compromise drawn up between the plaint and defendants, and filed in the High Co on the 11th of November 1862. Readi Clauses 4, 10, and 11 of this deed togeth the Judge comes to the conclusion that t plaintiff reserved to himself the right avail himself of the result of his appe then pending in the High Court, a that his position is as follows, to u the Judges own words: "He agreed, "the event of his succeeding in his appe "against the Rajah of Durbhanga, to fore "any claim on account of the two lacs "rupees appropriated by the defendant; b "by the 11th Clause of the deed of co "promise reserved to himself a right "sue other parties to that compromise f "the recovery of the loss he might inc "by the decision of the Judge bein "upheld."

On the whole, then, the Judge decides th the remedy of the plaintiff is against the Ra jah, and, thinking the suit rightly brought gives the plaintiff a decree for 25,530 rupees with interest from the date of the 21st Sep tember 1861, as being the sum which wa make up the total of Lotf Ali Khan's claim to that which he demanded in the previous suit, although that suit was not against the defendants, but against the Rajah.

Against this decision both parties appeal.

The plaintiff claims, not 25,530 rupees, but the

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total of his demand of 83,333 rupees; and the defendants appeal, urging that the plaintiff is out of time altogether, and that the decisions of September 1861 and December 1863 could not alter matters as between the shareholders in the family, and could give no new right of action.

We have heard the case argued with their usual ability by the learned Counsel on both sides, and, after the fullest consideration, we are of opinion that the decision of the Judge must be maintained. No fraud is alleged against the defendants, and no misrepresentation was practised against the plaintiff. The plaintiff's error is a pure error of law, and the judgment, whether of the first or of the High Court, ruling that the two lacs between the parties were paid as interest, and were to be credited to the joint and not to separate payments, cannot alter the *status* of the parties before us, and cannot give a new right of action. That judgment is, of course, binding on the plaintiff and the Rajah, who were the only parties before the High Court. But it will not bind the defendant, nor will it give the plaintiff a right to start such suit, nor put him in the position in which he would have been, had he never misconceived his correct legal claim. The Counsel for the respondent does not contend before us that any portion of the time lost in the previous litigation, from 1861 to 1863, can be deducted in his favor. It is admitted that, unless the decision of the High Court gives him a new start, and creates a fresh ground of action, he would be out of time. But, as we have said, we find no warrant in law for this doctrine that judgments of Courts, altering a pure legal misapprehension as to rights and *status*, and passed in a suit to which the defendant was not a party, can confer any such right on a plaintiff against defendants so circumstanced; and we think it is far better to allow parties to abide by the consequences of their own misconception or ignorance, where no fraud or deception is even alleged, as they are not in the present suit.

As regards the terms of the compromise, we think, on looking closely into Clauses 10, and 11 of that document, that it will not help the plaintiff. By the 4th Clause each shareholder expressly renounces any claim to moneys spent or appropriated by any other shareholders, or to moneys recovered from debtors to the estate. By the 10th Clause there is a mutual renunciation of all claims to removeable properties, and of claims comprised in certain specified law-suits. By the 11th Clause, there certainly is a reservation to the plaintiff of his rights in the suit *versus* the Durbhanga Estate, which suit is the foundation of the present claim. But the reservation is couched in vague and obscure language, merely specifying that, if "in future there should "be any contest between Lotf Ali and the "other shareholders, the compromise would "not stand in the way."

It is argued for the respondent that this last reservation must refer to the claim of 83,333 rupees in the present suit, and that the wording of the Clause is inexplicable on any other ground. But such language, putting aside for a moment its obscurity and uncertainty, cannot confer a right of action, if none existed, and if none was created by the decision in the suit and appeal referred to. Whatever the vague language of the Clause relied on may have intended, we can never hold it to mean that it gave plaintiff a right to claim from the defendants, not being parties to the appeal, what he had never thought of claiming until the decision of the High Court suggested this step. The language may possibly have been intended as a mere protection to the plaintiff against the defendants.

In disposing of these questions, we have by no means lost sight of the important fact that the defendants, by their own admission, have received from the Rajah 16,150 rupees more than their fare share; and that the plaintiff, on the other hand, has received less than his fair share of the debt by rupees 25,530, and that, if we could settle matters between the claimants by a rough sort of equity, we might at least decree to the plaintiff the former and lesser sum, if we did not, like the Judge, decree to him the latter. But we think ourselves bound to look strictly at the law in this case, especially between parties who were well aware of each other's position and rights, and who had ample means for attaining the best legal redress; and the Judge's decision in effect is not a full recognition of the justice of the plaintiff's claim, but a kind of equitable adjudication, which makes up to him exactly the sum which he failed to recover from a third party in his previous demand of 2,79,910 rupees, the High Court having awarded him only 2,53,480 rupees, or 25,530 rupees less than what he claimed.

But, for the reasons already given, we are of opinion that the plaintiff, if he could recover at all, would be entitled to the whole of his claim. On the ground, then, that the

legal time for suing has elapsed since the 25th of December 1856 before he instituted this suit, that the decisions of September 1861 and December 1863 give no new right of action, and that the compromise revived or created nothing in the plaintiff's favor, we must decree the cross-appeal of the defendant, and dismiss the appeal of the plaintiff with all costs in both Courts.

The 4th July 1865.

Present:

The Hon'ble J. P. Norman and Shumbhoonath Pundit, *Judges.*

Raj of Attgurh, one of the Tributary Mehals of Cuttack (Succession to)—Preferential title of brother over son of Phoolbebahi wife—Power of Rajah to devise estates.

Case No. 566 of 1863.

Regular Appeal from a decision passed by Mr. R. N. Shore, Superintendent of Tributary Mehals in Cuttack, dated the 21st August 1863.

Nittanund Murdiraj (Plaintiff), *Appellant,*

versus

Sreekurun Juggernath Bewartah Patnaick (Defendant), *Respondent.*

Baboos Dwarkanath Mitter, Onoocool Chunder Mookerjee, Mohendrololl Shome, and *Tarrucknath Sein* for Appellant.

Mr. R. T. Allan and *Baboos Unnoda Pershad Banerjee, Kishen Succa Mookerjee, Khetternath Bose,* and *Obhoy Churn Bose* for Respondent.

According to the *Pachees Sawal*, a brother of the Rajah of Attgurh, one of the Tributary Mehals of Cuttack, has a preferential title over the Rajah's son by a *Phoolbebahi* wife to succeed to the Raj.

Semble that the effect of a devise of his estates by a Rajah would be to alter the course of succession, and, therefore, contrary to Section 3, Regulation XI. of 1816.

BRIJOBUNDHO Narender Mohapater as the son by a *Phoolbebahi* wife of Bhoobunnessur Bewartah Patnaick, late Rajah of Attgurh, one of the Tributary Mehals of Cuttack, brought this suit to establish his title to succeed to the *guddee* as heir to his father, and also under a document alleged to operate as a will.

The defendant, Juggernath Bewartah Patnaick, the brother of Rajah Bhoobunnessur, alleged that the plaintiff was not the son of a *Phoolbebahi*, but of a slave girl, and that, as the son of a slave girl, or even of a *Phoolbebahi*, he would have no right to succeed.

Judgment was given in favor of the defendant by the Superintendent of the Tributary Mehals on the 21st of August 1863.

Two days before the date of that decision Brijobundho, the original plaintiff, died, and after proceedings to which it is not necessary further to allude, Nittanund Murdiraj, claiming to be the son of Brijobundhoo by a *Phoolbebahi* marriage, was admitted to carry on the appeal to this Court.

The defendant, however, alleged, and the Superintendent found, that Nittanund was only the son of a slave girl, and not of a *Phoolbebahi.*

The appellant's vakeel was heard before us on the 3rd and 4th of February 1864. The case was then postponed in consequence of his illness. It was again taken up and heard on the 26th, 27th, and 28th of the present month; some additional documentary evidence was put in by the leave of the Court for the purpose of clearing up suspicions expressed by the Superintendent as to the alterations of the word "*Bhatanee*" into "*Ranee Phoolbebahi,*" in a petition of the 8th of June 1857.

The appellant has undoubtedly shown that he has very good grounds for alleging: *first*, that, notwithstanding the answer of the Rajah Gopenath of Attgurh to question VIII., the *Phoolbebahi* marriage is known in the family of Attgurh; *secondly*, that such a marriage is good for some purposes, whether contracted by a reigning Rajah or by a member of the Rajah's family; and, *lastly*, that both he and his father were the sons of *Phoolbebahis.* If the decisions of the points in his favor would entitle the appellant to a decree, we should call on the respondent's vakeel to answer the case made by the appellant.

But, even if these points are made good by the appellant, the great question remains whether the son of a Rajah by a *Phoolbebahi* has a right to succeed in preference to a brother.

For an answer to this question we are referred to the *Pachees Sawal.* This appears to be a record embodying the answers given by the Chief of the sixteen Tributary Mehals in Zillah Cuttack, and of certain *killahs* in the province of Orissa, to questions put by the Superintendent in 1811. After that statement had been drawn up Regulation XI. of 1816 was enacted, which provided that the estates of these sixteen

tary Mehals should descend entire to person having the most substantial according to local and family usage.

answer to question VIII. given by thirteen Rajahs, it appears that, if a Rajah receives, wife, the daughter of any respectable not of his own caste, she is called a *hebahi*. But this passage is not con- in the answer of the Rajah of Attgurh. answers to questions X. and XII. shew that, in the Non-Regulation Mehals or *Gurhs*, if a Rajah leave no sons born of any of his Ranees, but leaves a brother and sons by his *Phoolbebahis* and concu- the brother will succeed, and, if he no brother, the succession will go to his 's sons.

—The *Phoolbebahi* is to the Rajah's Estab- by the ceremony of round her neck a gar- flowers. *Phoolbebahi* reside in the Mehal, family-dwelling. *See* Reports, p. 42. *See* Macnaghten's Hindoo 66.

the death of a Rajah, who leaves no y a Ranee, nor brother, nor brother's ough there may be sons born to him *Phoolbebahis*, slave girls, or concu- one of the brethren of his grand- (in the original برادران حدي) who is rest of kin will be rightful claimant Raj; in default of any such, the son *hoolbebahi* has the next right.

Gurhjat Rajahs say that "the son of cubine or of a slave girl has no right succession."

first question in the cause is there- isposed of by the *Pachees Sawal*, if at liberty to treat that document as a ctory proof of the custom of descent in nilies of the Gurhjat Rajahs.

a remarkable circumstance that the jat Rajahs, with the exception of the of Khordah (*see* answer by the Killah- ieftain to question XII.), gave to the a concubine a similar place in the of heirs to that which the *Gurhjats* to the *Phoolbebahi's* son, *viz.*, if no en connected with the late Rajah's father are alive.

first point relied upon was that the s of the Chiefs of the Non-Regulation *rhjat* Mehals were at variance with of the Regulation of *Killahjat* s; the *Killahjat* (*see* answer to ques- .) admitting the son of a *Phoolbebahi* ceed as heir in preference to a brother. Superintendent in his judgment has ed as a reason for this difference that Killah Chieftains feared that, if any ts were thrown in the right of the son "of a *Phoolbebahi* to succeed, the Govern- "ment might take opportunities of declar- "ing their estates lapsed." This suggestion, if well-founded, would impeach the authority of the answer as regards the *Killahjat* Rajahs. But we do not assent to the view of the Superintendent on this point. The motive suggested affords no sufficient reason for placing sons of *Phoolbebahis* before brothers. It appears to us more natural to suppose that differences in the customs of descent might not naturally spring up, and be produced by causes which it is impossible to trace. There is a remarkable difference between the *Gurhjat* and *Killahjat* custom of descent. With reference to the position of the son of a *Patranee*, *see* answers to questions IV. and V.

The appellant does not shew any single instance of the succession of the son of a *Phoolbebahi* to the exclusion of a brother of the late Rajah.

The *Pachees Sawal* appears to have been put in evidence, and treated as of great authority in the case of Rajah Sham Soondur Mohendar, appellant, *versus* Kishen Chunder Bewartah Rai, respondent, reported in the 4 Select Reports, p. 39. A suit, which in its earlier stages was pending before the Collector in 1812, was decided by the Superintendent in 1823, and finally on appeal in 1825. In the same case the Rajahs of Killahs Bankey, Nursingpore, Barombah, Sookindah, Talchar, and Runpoor, stated, though not unanimously, that sons of concubines (*Kuneez Zadas*) were not entitled to succeed, and that a *Phoolbebahi* Ranee was esteemed in a little higher light than a concubine. It may be observed that Sookindah is one of the Regulation Mehals, and that in these Mehals the son of a concubine might succeed to the Raj according to the answers given in the *Pachees Sawal*.

In the case of Rajah Jenarderi Ummur Singh *versus* Okhoy Singh *alias* Sham Soondur Mohendar, decided in 1835, and reported, 6 Select Reports, p. 42, the *Pachees Sawal* was accepted as proving the custom of descent in the *Dhekanal* family; and, in accordance with the answers, the Sudder Court, confirming the decision of the Assistant Superintendent, held that the plaintiff, the son of a prostitute or slave concubine, could not inherit the Raj; and that the defendant, the brother of the late Rajah, born of the *Phoolbebahi* wife of his father, was entitled as against him to the Raj.

That the son of a slave girl cannot succeed in *Bankey* was decided in 1840 in the

case, 6 Select Reports, p. 296.. In the *Parikood* case (not reported) decided by the Judge of Cuttack in 1842, the *Pachees Sawal* was referred to for the purpose of proving the custom of descent. The Judge found it to have been proved that the Rajah of Parikood was a *Khettry* by caste. He says the Rajahs of Nyaghuri and Khondparah, who are of the same caste with the Rajah of Parikood, have stated that the Rajah was a *Khettry;* and that under their family usage, and that of the Rajah of Parikood, the *Sapinda* of the minor Rajah (deceased) is entitled to the Raj, notwithstanding the existence of a son of his father by a *Phoolbebahi* wife, and that the case was decided in accordance with this evidence. In the Hurishpore case, Prandhur Roy *versus* Ram Chunder Magraj, 1 Sudder Report, 1861, p. 16, the Court point out that "the "authority of the answers given by all the "*killahdars* consulted in 1814, and embodied "in the Commissioner's statement, was never "impugned till 1841, when in the *Parikood* "case a single Judge of the Sudder Court "ordered *kyfeuts* to be taken from other "*killahdars.*"

It may very well be that, in the cases of Parikood and Hurishpur *Killahs*, the Chiefs of which had not been consulted as to their family usages in 1814, evidence may have been necessary in order to show that custom of descent in those families was identical with, or similar to, that of the *killahdars*, the substance of whose answers is recorded in the *Pachees Sawal.* The fact that such evidence was taken does not, in our opinion, in any manner, impugn the authority of that document. No single case referred to has been shown to be inconsistent with it. Its authority has been recognized in every case, and the independent evidence of usage appears in every case to be entirely consistent with it. The attempt to impeach the authority of the *Pachees Sawal* has utterly failed. We think that the defendant's title as the brother of the late Rajah to succeed to the Raj is preferable to that of the plaintiff, the *Phoolbebahi's* son.

The appellant next contended that he was entitled under a will. But the instrument relied on, which is in the form of a petition addressed to the Superintendent, signed by a mookhtear on behalf of the Rajah, is not in its nature testamentary, and, therefore, we need not discuss the question whether Rajahs, who have no direct heirs, have the power of devising their estates. Whatever they might be able to do by way of gift in their life-time, the effect of the exercise of such a power by will would seem to be to alter the course of succession, and therefore contrary to Regulation XI. of 1816, Section 3. The answer to question XVI. shows that there is no instance in which a gift, even in the life time of a Rajah, has been held valid, and there can, therefore, be no custom to the effect that such gift by way of will is valid.

On these grounds we are of opinion that the appellant's case wholly fails, and we, therefore, dismiss the appeal with costs and interest.

The 4th July 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Suit for specific performance of contract—Adjustment subsequent to and beyond decree.

Case No. 129 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 26th January 1865.

Ram Luchun Bubra (Plaintiff), *Appellant,*

versus

Madhub Chunder Bubra (Defendant), *Respondent.*

Baboo Unoocool Chunder Mookerjee for Appellant.

Babous Banee Madhub Banerjee, Hem Chunder Banerjee, and *Gopeenath Mookerjee* for Respondent.

Suit laid at rupees 9,494-7 as. 15 gs. 2 ca.

A suit lies for specific performance of a contract in respect of an adjustment subsequent to, and for property beyond, the decree, notwithstanding Section 11 of Act XXIII. of 1861, which applies only to subject matters relating to the decree.

THE parties to this suit had been in litigation in respect of a share of certain house property which the defendant claimed by right of inheritance, and for which the defendant obtained a decree with mesne-profits and costs against the present plaintiff. The plaintiff alleges that, while execution of the decree was pending, he and the defendant came to an amicable arrangement, under which he was to obtain possession from defendant of certain premises not in the decree, and the defendant was to obtain possession from him, plaintiff, of certain other premises also not in the decree, and the defendant at the same time agreed to give up certain of his rights

under the decree to mesne-profits and costs. The arrangement in question was, however, when put into Court, rejected by the presiding judge under Section 206 of Act VIII. of 1859: because it was an adjustment not made through the Court, and not certified to the Court by the party in whose favor the decree had been made, and the decree was executed as if no such arrangement had been entered into. The plaintiff now, in fact, sues for a specific performance of that arrangement or contract. He puts his plaint in an untenable shape, *i. e.*, he asks to be released from the liability for mesne-profits and costs under the decree as well as to obtain possession of the property which was made over to him by the agreement. There is no doubt that he cannot be released from the liability under the decree. Indeed, we understand that that decree has been finally executed. But he might be allowed to amend his plaint to a demand to obtain so much money and such property as he is entitled to under the contract entered into by the defendant by the deed of rufanamah.

If the plaint is put in this shape, the question still will arise whether the claim can be admitted or not? The Principal Sudder Ameen is of opinion that it cannot be heard; that the *contract* in question is an adjustment of the former decree which was illegally carried out, and is, therefore, null and void, and regarding which no separate suit could be preferred under Section 11 of Act XXIII. of 1861.

We think, however, that, although the adjustment in question was very properly rejected in the execution proceedings in the former case, there was nothing illegal in the adjustment. The present defendant therein said to have contracted that he would certify to the Court. He did not do so, and the decree went to execution as if no such adjustment had taken place. But we think that this adjustment may fairly be looked upon as a contract entered into by the parties subsequent to, and, by its terms, for property not in the decree, and, therefore, a suit for specific performance will lie. In fact, the subject-matter being beyond the decree, Section 11 of Act XXIII. of 1861, which relates to subject-matters relating to the decree, would not apply. We may further remark that the property in suit is more extensive than that covered by the former decree. The present plaintiff has thus, then, we think, a distinct cause of action, which has arisen subsequent to, and beyond that, decree, and upon which we allow the suit to proceed to trial upon the plaintiff amending the terms of his plaint. Appeal decreed with costs of this appeal on appellant, plaintiff, as his plaint was not correct.

The 4th July 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Mortgage by and sale in execution of decree against one co-sharer—Subsequent sale by all the co-sharers.

Case No. 788 of 1865.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 30th January 1865, affirming a decision passed by the Second Principal Sudder Ameen of that District, dated the 29th September 1864.

Muddun Lall Doss (one of the Defendants), *Appellant,*

versus

Ashootosh Banerjee (Plaintiff) and others (Defendants), *Respondents.*

Baboo Banee Madhub Banerjee for Appellant.

Baboos Muttee Lall Mookerjee and *Kedarnath Mojoomdar* for Respondents.

A property belonging to several proprietors, but mortgaged by one to his accreditor, was sold in execution, and the purchaser took possession of the whole. The debtor and his co-proprietors having, subsequent to the mortgage, sold the whole property to the plaintiff, the plaintiff sued to set aside the sale; but his purchase was considered not *bonâ fide* and in fraud of the creditor on the assumption that the mortgage, like the sale, was by all the proprietors. The plaintiff, with the consent of the other co-sharers who were not indebted, and who had not mortgaged their rights, now sued for determining how much the purchaser was entitled to hold under the sale. As in execution of decree only the rights and interests of the debtor are sold—HELD that the present suit was not barred, as no sale by the other co-sharers could be in fraud of the creditor of the co-sharer who alone was the debtor; and that, as against the co-sharers who admitted the sale of their rights to the plaintiff, the purchaser could not retain possession of their shares.

THE objection of the special appellant is: *first*, that, the deed of sale being disproved in the former suit by the present plaintiff against the defendant, special appellant, the present action cannot be maintained. It is evident that the decision of the Lower Appellate Court in the former case was simply meant to determine that a mere nominal sale was made; and that such a sale made in fraud of the creditors could not injure their rights. In this decision, the fact that the previous mort-

gage of property to the creditors, if not by all the holders of it, at least by some of the debtors, must necessarily have precedence over any subsequent sale by them, was overlooked; the genuineness and *bonâ fide* nature of the deed of sale were unnecessarily tried, and it was taken for granted that the whole of the property was mortgaged by all the parties entitled to hold the entire estate. The Judge below, when he passed that decision, never intended to determine the exact amount which the purchaser, in execution of a decree given for money secured by the mortgage, could legally acquire by the sale. In the present case the plaintiff sues to have that question determined; and, when it is admitted that the entire property now held by the purchaser at the execution-sale was not mortgaged, but the rights of only some of the co-proprietors, and as, by the sale, only the rights and interests of those who were debtors could be passed to the purchaser, the property in that portion which is not covered by the mortgage lies either in the plaintiff, or, if not in him, then in the proprietors of these portions. The plaintiff now sues, as the party entitled to hold that portion, and, though his deed of sale might have been found collusive as against creditors, yet, when those to whom it legally belongs say that they have passed their rights to the plaintiff, the purchaser in the sale for execution cannot object to the title of the plaintiff, for no sale or gift of the property can be in fraud of one who is a creditor of persons other than those whose rights the plaintiff here claims. The Judge was right in deciding in the present suit what passed by the sale.

The *second* objection is that the share of the minor brother of Monajooddeen cannot be decreed to the plaintiff, as, by the decree in the mortgage-cases, it has already been decided that his elder brother had borrowed the mortgage-debt also for the benefit of the minor; and that, if the question of the necessity of the incurring of the debt can be tried in this case, the objection should have been taken in the first Court; and, if such a point for decision could be taken up by the Lower Appellate Court, that Court should have allowed the special appellant some opportunity to offer evidence. We think that the question on necessity may be tried in this case, provided it has not been finally and completely decided in the mortgage-case. That it was not decided in the case preceding this suit is obvious. That the Appellate Court has power to frame and try new issues is clear. We think, however, that the appellant had not sufficient opportunity to p duce his evidence. Neither the decree nor mortgage-deed is now before us. These sho be produced. The case is remanded to Lower Appellate Court to decide the quest of the validity of the sale of the decree of share of the infant brother; whether the p perty of the infant was mortgaged, if it mortgaged; then to ascertain whether the mo gage-debt was in any part incurred for infant; and, if so, whether the necessity which it is said the debt was incurred ju fied the borrowing. If the Court shall satisfied by the production of the decree other evidence that this matter was fin decided in the mortgage-suit, this will b bar to all further enquiry, or adjudicatio the present suit.

The 5th July 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Decrees against representatives of deceased p sons—Attachment of private property Widow—Notice (on second application for ecution)—Damages.

Case No. 127 of 1865.

Regular Appeal from a decision passed Mr. W. Ainslie, Judge of Patna, dated 4th February 1865.

Syed Ruznudeen Hossein (Defendant), *Appellant,*

versus

Musst. Fuzalun and another (Plaintiffs), *Respondents.*

Mr. C. Gregory and *Moonshee Ameer Al Khan Bahadoor* for Appellant.

Baboo Onoocool Chunder Mookerjee for Respondents.

The holder of a decree against a deceased perso bound to proceed against the property of the dece before he can attach the private property of the ceased's widow.

Where an execution-case has been struck off, an order has been made by the Court directing execu to be issued against the heirs, notice under Section should be re-issued before execution is taken out.

Though the proceedings immediately connected a sale of moveable property be regular, so as to af no ground for an action of damages, yet, if a dec holder has omitted to do what he is legally boun do, and has thereby caused injury, the party inj may claim damages.

PLAINTIFF is the widow of one Dia Hossein, and after his death she brought action against his heirs to recover

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ount of her dower, and, on the 20th August 61, got a decree for 7,000 rupees against e estate and the heirs in possession.

The defendant held a decree against Dianut ein, dated 16th February 1850, which he ght to execute against the heirs of the de-ed Dianut, and in execution seized and the decree for dower held by the plaintiff, purchased it himself for 600 rupees.

he plaintiff endeavoured to set aside the summarily, but failed before the Judge, held in appeal that, as the decree sold moveable property, plaintiff could only g an action for damages by suit in Court escribed in Section 252 of Act VIII. 859, if she had suffered any injury from irregularity in the sale. Plaintiff has rdingly brought the present action for ages for 7,934 rupees, the actual loss to y the sale of her decree for dower, and the e has given her a decree, holding that defendant, decree-holder, was bound to eed against the property of the deceased e he took the private property of the tiff in attachment; and, *secondly*, that, g to the failure in serving the notice ribed by Section 216 of the Procedure , there had been a material irregularity e sale-proceedings, which had caused s injury to the plaintiff.

is necessary to note the steps taken by defendant in executing his decree. On November 1861, application was made execution against the heirs of Dianut ein, and the list of property sought to tached consisted of this claim for dower. 7th January 1862, Fuzalun objected to ale of the claim, as it was her private erty. An answer was filed by defend-n 25th April following, and on 18th ember 1862, the Court, without decid-whether the claim was or was not liable le in liquidation of the debts of Dianut ein, struck the execution-case off the file. ugust 1862 plaintiff obtained a decree ower, and on 17th April 1863 fresh appli-n for the sale of this decree was made, process of attachment was taken out, and lamation fixing the 30th September as date of sale was issued, on which date sale was made. On the 6th October , the plaintiff filed a petition of objec-to the sale, on the ground that her te property could not be held primarily e for her husband's debt; that she was aware that any proceedings in execution been taken out against her. The Sud-Ameen, on 10th February 1864, rejected second plea, but, considering the first valid, set aside the sale. On appeal to the Judge, he held, on the 16th April 1864, that the sale of moveable property could not be set aside, but that plaintiff was at liberty to bring a suit for damages, which she has done.

The questions before us are:—

1st.—Whether the judgment-creditor was not at liberty to proceed against any property, either private or inherited from her husband, to the extent of the share of her husband's property, which came into the plaintiff's hand?

2ndly.—Whether it was necessary to issue a notice under Section 216, one having been already served?

3rdly.—Whether there was any irregularity in the sale, so as to entitle plaintiff to claim damages?

In determining the *first* point, it will be necessary to read Sections 203, 210, and 211 together. The first Section refers to decrees against the representatives of deceased persons. Section 210 relates to the execution of a decree where the person against whom it was made has deceased before the decree has been fully executed, and it allows execution to be taken out against the legal representative or the estate of the person so dying; and Section 211 prescribes that, if the decree be ordered to be executed against the legal representative, it shall be executed in the manner provided in Section 203 for the execution of a decree for money to be *paid out of the property of the deceased person.* Now, Section 203 distinctly prescribes that, if the decree be for money to be paid out of the property of the deceased person, it may be executed by the attachment and sale of any such property; and it is only when no such property is found, and the defendant or his representative fails to satisfy the Court, that he has applied such property as came into his hands to the liquidation of the deceased's debts, that the decree-holder can come down on such representative, and then only to the extent of the share of the deceased's property which came into his hands. We think, therefore, that the defendant acted contrary to law in attaching the private property of the plaintiff, before taking measures to bring the property of the deceased in her hands and in that of the representative of the deceased to the hammer in liquidation of his claim.

On the *second* point we find that a notice was served upon the plaintiff in November 1861, when she appeared and filed a petition of objection which was never enquired into, and the case was struck off on 18th September 1862, revived in April 1863, and, with-

out further notice to the plaintiff or further reference to her objection, the property was sold on 30th September 1863. It appears to us clear from the wording of the law that, when the second application for execution was made in 1863, a further notice should have been served; for on the previous application against her (*see* second proviso in Section 216) *the Court had not ordered execution* to issue against her.

We come now to the *third* point. If the irregularity spoken of in Section 252 of the Procedure Code be limited to the actual proceedings immediately preceding a sale, such as are described in Section 249, and consist in the proper issue of notice of sale, and of conducting the sale, we can find no such irregularity in the proceedings as to warrant our giving a decree for damages; but if we may look beyond the immediate proceedings, and then if we find that, though these are in accordance with the forms prescribed by law, yet other most important steps required by law, without which no process against the person or property could have issued, have been neglected, we may, we think, without in any way putting a construction upon Section 252 which it might not bear, hold that, by neglecting to do what he was legally bound to do, the defendant has, by the sale of the plaintiff's decree for dower, inflicted a serious injury upon her; and that, in consequence, she is entitled to recover damages in the amount claimed. Looking at the case in this view, we see no ground for interfering with the order passed below, and dismiss the appeal with costs.

The 5th July 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Sale for arrears of Revenue—Obligation of lender.

Case No. 218 of 1865.

Special Appeal from a decision passed by Mr. E. G. Birch, Judge of Moorshedabad, dated the 6th December 1864, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 18th July 1864.

Nuffer Chunder Banerjee (Defendant), *Appellant,*

versus

Guddadhur Mundle and others (Plaintiffs), *Respondents,*

Baboos Onoocool Chunder Mookerjee and *Upprokash Chunder Mookerjee* for Appellants.

Baboos Grees Chunder Ghose and *Gopal Loll Mitter* for Respondents.

A lender is not bound to enquire into the exact amount necessary to be borrowed to save an estate from sale for arrears of Government revenue. It is sufficient if he satisfy himself of the existence of a necessity to justify him in looking to the estate for re-payment.

We think the decision of the Judge is good in law. It is contended against him that the necessity for payment of a certain amount of Government revenue did not justify the loan of a larger amount, and more than sufficient to save the estate from sale. But we do not think that the lender was bound to enquire into the exact amount necessary to be borrowed. It was sufficient that he did satisfy him of the existence of a necessity to justify him in looking to the estate for re-payment, and in this view the ruling of the Judge correctly applies the law to the facts.

We see no necessity for interference, and reject the appeal with costs.

The 5th July 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Alluvial lands—Act IX. of 1847.

Case No. 677 of 1865.

Special Appeal from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated the 7th December 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 19th February 1864.

Kallynath Roy Chowdhry and others (Plaintiffs), *Appellants,*

versus

Mr. J. Lawrie and Government (Defendants), *Respondents.*

Mr. J. T. Woodroffe and *Baboo Prosunno Coomar Sein* for Appellants.

Baboos Kishen Kishore Ghose, Sreenath Dey and *Mohendrolall Seal* for Respondents.

An accretion to a chur belongs to the owner of the chur, whether the channel between the main land and the chur is fordable or not.

We have referred to the two decisions which were cited (Wise *versus* Ameerunnissa Khatoon, II. Weekly Reporter 3[illegible] and Wise *versus* Abdool Ali, *ibid* 127)

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each of which the Court expressed an opinion concerning the effect of Act IX. of 1847 on the right of the Government to the ownership of islands newly formed in large and navigable rivers. The contest in both those cases was between private persons; the defendant in each case having in himself no right or title, but only a bare possession, confirmed by the Magistrate's order under Act IV. of 1840; and the plaintiff having no better right than this, that the channel between the neighbouring main land and the island had recently become shallow and fordable, and that thereby the ownership of the island had accrued to him as the adjacent proprietor. The defendant sought to defeat the plaintiff by setting up a better right in a third person, that is, in the Government. But he did not show that he himself claimed under or stood upon the title of the Government; and, indeed, it appears, on the contrary, that he was a mere intruder, or "squatter," and that the Government had in one of the cases more or less formally disclaimed all right in the plaintiff's favor. The Government had at no time exercised any act of ownership over the island, nor even in any way indicated an intention to assert its ownership. Still less had it taken any formal measures for the assertion of its right to the ownership. Under these circumstances, the Court decided that the plaintiff's title must prevail over the mere possession of the defendant. The Court also intimated an opinion respecting the operation of the Act IX. of 1847, one of the learned Judges stating that the 7th Section must "be taken as there as suspending for ever, and, in fact, taking away the right of Government to assert a right of ownership in any lands as lands, if they were not found to be island at the time of the re-survey."

In the present case the land claimed by the plaintiff is in the possession and occupation of the Government by its lessee. The defendants in the suit are the Government and the lessee of the Government. Moreover, the land claimed is not an island of recent formation, but land which, as the Court has found, has accreted to the Chur Baggeera (which belongs to the Government). That this chur, however, changed in form since the time of its first appearance, is still in existence, has been established. The ownership of the chur decides who is the owner of the accretion to the chur, and it is immaterial whether the channel between the main land and the chur is fordable or not. The decisions cited are inapplicable to the circumstances of this case, and it is unnecessary for us to express any opinion respecting the construction of Act IX. of 1847. We dismiss the appeal with costs.

The 6th July 1865.

Present:

The Hon'ble *Sir* Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble E. Jackson and F. A. Glover, *Judges*.

Principal and agent—Assistant in an Indigo Factory—(Power of, to purchase Indigo Seed).

Case No. 202 of 1865.

Special Appeal from a decision passed by Mr. E. F. Lautour, Additional Judge of Bhaugulpore, dated the 28th September 1864, reversing a decision of Syed Waheedooddeen Khan, Principal Sudder Ameen of that District, dated the 20th July 1863.

Roghooburdyal Mundur (Plaintiff), *Appellant*,

versus

Mr. Alexander Christian (Defendant), *Respondent*.

Baboo Dwarkanath Mitter, *Moonshee Ameer Ali*, and *Mr. J. Baptist* for Appellant.

No one for Respondent.

Held by the majority (Glover, J., dissenting) that it is not within the reasonable scope of the authority of an Assistant in an Indigo Factory to purchase any amount of Indigo Seed for his master, and to make his master liable, particularly where the seed was not purchased or used for the factory; and that, though the Assistant, in writing to the vendor for the seed, styled himself in the body of the letter as the Manager of the Concern, yet his signing himself for another person, and not for the owner of the factory, disclosed to the vendor that the other person, and not the owner of the factory, was his principal.

Glover, J.—THIS was a suit to recover 2,928 rupees, balance, with interest, of an account for Indigo Seed sold.

The plaintiff, who is the special appellant before us, states that he received an order from the defendant Rayneau, who was Manager of the Putturghatta Indigo Factory, on the 1st of March 1863, for 256 maunds of Indigo Seed at 19 rupees the maund; that, on the strength of this letter, the seed was weighed in the presence of servants of the factory, and carried away to the factory godowns; that rupees 1,900 of the sum due were paid, and a promise given to pay the balance within a week at Bhaugulpore. The promise not having been fulfilled, this suit was brought against Rayneau, Clarke, and the

owner of the Putturghatta Factory, Mr. Christian.

The defendants Rayneau and Clarke filed no answer. Mr. Christian pleaded that Rayneau had no authority from him to purchase the Indigo Seed; that he never received the seed; and that the transaction was a private one between Rayneau and the plaintiff.

The Court of first instance gave a decree against Christian, on the ground that Rayneau, in purchasing the seed, acted only as Christian's agent.

But the Judge on appeal released Mr. Christian from responsibility, holding that he had given Rayneau no authority to purchase the seed, and that the plaintiff in selling it to Rayneau acted without warrant, and must take the risk. Clarke was included in the decree, and both were made liable for the balance due.

The plaintiff now appeals specially, urging that he sold the Indigo Seed to Rayneau on the faith of his Hindee letter, in which he styled himself Manager of the Putturghatta Factory, and not to Rayneau or to any one else as an individual; that the factory servants took delivery of the seed, and stored it in the Putturghatta godowns; and that special appellant had, therefore, every reason to suppose that he was dealing with the factory, which ought to make the owner of the factory, Mr. Christian, liable.

This case has been very carelessly conducted by the Lower Courts, and important evidence has been neglected. For instance, the factory books should have been called for and examined, touching the payment of the 1,900 rupees on account. If the seed had been bought on account of the factory, that item would have been found in the accounts, and this piece of evidence would have helped materially to elucidate the case. Again, no evidence has been taken regarding the connection between the two defendants Rayneau and Clarke, whether they were ever commissioned by Messrs. Moran & Co. to purchase Indigo Seed, or whether they had ever before bought seed as Moran & Co.'s agents.

All these points have been left unenquired into; both Courts being apparently satisfied with some irregular statements made by the special appellant's vakeel, that Rayneau and Clarke were brothers-in-law; that the latter had been dismissed by Moran & Co., had filed his schedule in the Insolvent Court, and entered the present claim as a debt personal to himself.

But, taking the evidence as I find it on the record, I have no doubt that the special appellant sold the seed under t impression that he was selling it to t factory, and that for these reasons the ord is conveyed in a Hindee letter which sta that Mr. Rayneau, Manager (*Karpurd* is the word used) of the Putturghatta Fa tory, wishes to have so many maunds Indigo Seed at 19 rupees a maund.

At the top of this letter is written, "F G. E. Clarke, H. Rayneau, Putturghatta."

It is contended that this superscripti clearly shows that Rayneau bought t seed for Clarke; but, so far as the special a pellant is concerned at least, I do not thi that the words can fairly carry any su meaning. In the body of the letter whi is written in Hindee, the special app lant's language, not a word is said abo Clarke, or that the seed was purchased a joint or separate account for that indi dual. Rayneau styles himself Manager the Putturghatta Factory, and, with tho words staring him in the face, is it reason able to hold that the seller ought to hav discovered for himself that the Engli writing at the head of the letter entir contradicted the Hindee writing in t body of it, and changed the contract fr one with a solvent factory, to one with person with whom special appellant had h no previous dealings, and to whom, doubtl he would have at once refused credit?

There is no assertion anywhere in record that this man Clarke had ever p chased Indigo Seed before, or that he in any way known to the special appella It is admitted that the seed delivered, the strength of Rayneau's order, was weig ed and carried off by factory servants factory carts; and in the face of all th it would, in my opinion, be most inequ table to hold that the seed was sold, no the factory, but to Rayneau and Clarke.

I consider that the special appella had every reasonable ground for believi that he was dealing with the manager of t factory for factory-uses; and that the me superscription of Clarke's name, in what w to the special appellant an unknown tongu cannot do away with the presumption th arises in special appellant's favor.

There remains the question whethe under the circumstances, special appella was justified in selling seed to Mr. Rayne as Manager of the Putturghatta Conce at all?

It was contended for the special respond ent, Mr. Christian, in the Court below (h is not represented before us) that Mr

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Rayneau had no authority to purchase seed. But this would not affect the question, for the general rule of law would make the principal liable for all frauds, torts, and negligences of his agent when done in the course of his employment, though not sanctioned nor even forbidden by his principal (Collett on Torts, p. 60); so that, as the order for seed was, as I understand it, given by Rayneau in his capacity as Manager or Karpurdaz," it would be no defence to the present action to say that Rayneau acted fraudulently throughout, and appropriated the seed to his own or others' use. The question would still be, how did he get it originally? Had Mr. Christian, the owner of the factory, given out publicly that his agent Rayneau had no authority to purchase Indigo Seed, it would have been a different thing; but, as he allowed Rayneau to manage the factory, and to act in all other respects as his agent, he must, I conceive, be made responsible for that agent's acts, and for all liabilities contracted by Rayneau in that capacity.

For these reasons I would reverse the present Appellate Court's order, and restore that of the Court of first instance with costs to the special respondent.

Jackson, J.—I differ in opinion with my learned colleague in the view which he takes of this case.

The point at issue is, whether Mr. Christian is liable for a sum of 2,928 rupees due on account of the purchase of Indigo Seed by his Assistant, Mr. Rayneau, who effected the purchase while he was in charge of Mr. Christian's Indigo Factory, Putturghatta.

Mr. Christian denies that Mr. Rayneau had received any authority from him to make such purchase. The Principal Sudder Ameen found, as a fact, "that the seed was purchased for the Putturghatta Factory, and used there," and accordingly decreed the claim against Mr. Christian, holding him responsible for the acts of his agent. The Judge, on the appeal of Mr. Christian, found, on the other hand, as a fact, "that there was no proof on the record to show that the seed was purchased for or on behalf of Christian, and that it was used for and on account of the factory."

The Judge goes on to say: "Christian resides at Monghyr, and Rayneau was in charge of the Putturghatta Concern as an assistant only, and had no authority to purchase Indigo Seed granted to him by his master. The transaction appears to have been a private one;" and he finds ultimately that Rayneau purchased, not for Christian, but for his brother-in-law, Mr. Clarke.

In these findings of fact, it appears to me that we cannot interfere on special appeal. But it is said that Rayneau, in purchasing Indigo Seed, acted within the scope of Agency as Manager of the Putturghatta Concern; and that in the letter in which he wrote for the Indigo Seed, he styled himself, in the Hindee portion of it, Manager of that Concern; and that consequently his principal, Christian, is liable. It appears to me that it would be giving a very wide scope to the power of an agent to bind his principal, if we are to hold that any assistant at an Indigo Factory has, by his appointment, authority to bind his master to the amount of several thousand rupees for purchasing Indigo Seed.

There is nothing in the decision of either Court to show that Rayneau had, on any former occasion, made such purchases which had been recognized by Mr. Christian, so that the plaintiff in this case might thence have inferred that Rayneau possessed such authority.

The plaintiff was bound before he supplied Rayneau with Indigo Seed, even for Mr. Christian, to be quite certain that Rayneau held authority to make the purchase. Of course, if the purchase had been made even without authority, but still for the use of the factory, and the seed had been sown on the factory lands, Mr. Christian might be held liable, notwithstanding the absence of any original authority. But the fact is found most distinctly by the Judge that the purchase was not for the factory, and that the seed was not used for the factory, but that the purchase was for Mr. Clarke, and was a private transaction of Rayneau's on behalf of his brother-in-law, Clarke, who was purchasing for Moran and Co.

The only doubt which is raised upon the point arises from the fact that Rayneau, in writing to the plaintiff for the seed, though he distinctly signed himself Rayneau for Clarke, at the same time in the body of the letter styled himself the Manager of the Putturghatta Concern. Even here the Judge has found that Rayneau had no authority to purchase for Christian. But, if such authority did exist, and it was within the scope of every assistant's authority to purchase any amount of Indigo Seed for his master, still it appears to me that Rayneau in signing Rayneau for Clarke disclosed to the plaint-

iff that Clarke was his principal, and not Christian. It is said that the plaintiff could not read English. That may be. It is not certain, and not proved, that Rayneau was aware of this fact; but it is admitted, even by the plaintiff's pleader, that, if the plaintiff had been able to read and understand the meaning of the words Rayneau for Clarke, Christian would not be liable. Surely, then, Christian cannot be liable, because the plaintiff did not take the trouble to read what was written to him, or to have read to him what he could not read himself. Had the plaintiff made any enquiry at the time, he might have ascertained for whom the Indigo Seed was required. Rayneau was not acting secretly or in fraud, but was openly disclosing his principal's name. Plaintiff was acting carelessly, advancing to Rayneau nearly 5,000 rupees worth of Indigo Seed without ascertaining for whom it was required, and without ascertaining that Rayneau had any authority to purchase Indigo Seed for others. It appears that, since this purchase was made, a sum of 1,900 rupees was paid, but after that Rayneau failed, and Clarke was dismissed, and Rayneau turned out of his appointment; and hence the plaintiff has never been paid the balance. The plaintiff now wishes to throw the loss on Christian; but in my opinion he cannot in good conscience and equity, on the facts found by the Judge, succeed in this.

Had it been found that Rayneau had authority to purchase for Christian, or that it was within the reasonable scope of his authority to make such purchases, the plaintiff might have had some ground to call upon the Court to declare Rayneau liable upon the terms used by Rayneau in the body of his letter, notwithstanding what was written in English; though, even then, I should have decided against that view.

The plaintiff was, I think, deceived, not from any attempt to deceive on the part of Rayneau, but from the hasty manner in which he agreed to Rayneau's request without making any enquiries.

I would dismiss this appeal with costs.

Peacock, C. J.—I concur with Mr. Justice Elphinstone Jackson that this appeal should be dismissed with costs. The reasons are so fully given in that judgment that I need not detail them. The contract on the face of it "Rayneau for Clarke" shows that Clarke was the person on whose behalf the contract was entered into.

The 6th July 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton Karr, *Judges.*

Judgment of Appellate Court—Reasons for.

Case No. 276 of 1865.

Special Appeal from a decision passed by the Judge of West Burdwan, dated 9th December 1864, affirming a decision passed by the Principal Sudder Amin of that District, dated the 4th September 1862.

Khettur Mohun Gossain (one of the Defendants), *Appellant,*

versus

Bhyrub Chunder Sheet and others (Plaintiffs), *Respondents.*

Baboo Nilmadhub Sein for Appellant.

Baboo Roopnath Banerjee for Respondents.

Where issues in bar are pleaded, and averments traversed, the Lower Appellate Court should record some reasons for its endorsing the opinion of the first Court.

THE decision of the Judge in this case does not meet the requirements of the law. Under Section 359 of the Code of Civil Procedure, an Appellate Court is bound to record the point or points for determination, the decision thereupon, and reasons for such decision in the case. The issue, as put by the Judge, is to this effect:—

Plea.—The appellant urged that the decision of the Lower Court should be reversed.

Issue.—Should it?

The Judge, without giving any reasons, confirms the decision of the Court below.

The decision of the first Court is a very elaborate one, and enters fully into the complicated questions which were raised. The Judge's duty was to give his reasons for concurring or otherwise with these reasons.

In cases where a suit is decided upon a simple question of fact, and the Judge, without giving any detailed reasons, endorses the opinion of the Court below, we would, as a general rule in special appeal, decline to remand a case for an expression of opinion, but in a case like the present, where issues in bar were pleaded, and averments were traversed, it is essential for the ends of justice that the Lower Appellate Court should record some reasons for its finding.

The 6th July 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

...e of Howala for arrears of rent—Subor...dinate under-tenures to the Howala not pro...tected.

Case No. 79 of 1865.

...lar Appeal from a decision passed by ... Principal Sudder Ameen of Backer...nge, dated the 22nd December 1864.

...Doorga Churn Kur Sircar (Defendant), *Appellant,*

versus

...und Moyee Debia, Mother of Probhosh Chunder Gangolly, Minor (Plaintiff), *Respondent.*

...Baboo Onoocool Chunder Mookerjee for Appellant.

...s Greeja Sunkur Mojoomdar, Chunder ...dhub Ghose, and *Omesh Chunder Ban...ji* for Respondent.

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...plaintiff claiming possession of an ousut howala ... neem howala as existing under a howala also ... him, on the sale of the howala in execution of ...ee for arrears of rent, the subordinate under...s, having been ascertained not to be created in ...ith, were not protected.

...e plaintiff in this case claimed posses... of an ousut howala tenure and a ... howala under-tenure, belonging to ...plaintiff, and existing under the howala ...e plaintiff, sold by the defendant for ...rs of rent. The Court below was not ...ed of the existence of the first under...re, the ousut howala, but decreed ...ession to the plaintiff of the neem ...la.

...e howala and its under-tenures, the ... howala and the neem howala, are ...ed to have been held by the ancestor of ...plaintiff, and then by the plaintiff; and ...re not prepared to admit that, even if ...fact of such a sub-creation of the original ...la into two other under-tenures, one ...r another, had been found to have been ...ally made by the appellant's ancestor, ...would be entitled to plead that the ...-tenures were *bonâ fide,* and so protect...r the sale for arrears in execution of ...ee under Act X. of 1859 in respect of ...howala itself.

Further, the evidence upon which the Court below has believed the existence of such a three-fold sub-division of the howala is altogether unsatisfactory.

The dowl filed in the Collectorate upon which the Court below believed in the existence of the last under-tenure is a paper, the meaning and purport of which we cannot understand; and the respondent has entirely failed to explain why and when it was written by the plaintiff and filed in the Collectorate.

The former and the present laws, which provide for the sale of under-tenures in execution of decrees for rents, never intended to protect such under-tenures, held by one and the same person, and created only with a view to defraud the purchaser on the occasion of a sale for arrears of the rent of the highest landlord whenever he may have occasion to sell for arrears the right of his lessee in the original tenure created by him.

We are surprised that the Court below should have acted upon hearsay evidence as legal proof.

The farm taken by the landlord of the howala and the under-tenures does not entitle the plaintiff to obtain a decree. We do not know the real nature of this farm on the occasion of its creation.

The Court below has not decreed the claim for the superior under-tenure (the ousut howala), though it was also farmed by the landlord of the plaintiff. We are satisfied that such under-tenures as are pleaded by the defendant did not exist *bonâ fide,* if they existed at all; and that they are not intended to be protected after a sale of the superior under-tenure in a decree under Act X. of 1859. We accordingly reverse the decision of the Lower Court, and decree the appeal with costs.

The 10th July 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Misjoinder—Combined causes of action.

Case No. 616 of 1865.

Special Appeal from a decision passed by Pundit Sreenath Bidyabagish, Principal Sudder Ameen of Dinagepore, dated the 22nd December 1864, affirming a decision passed by the Sudder Ameen of that District, dated the 8th July 1864.

Kinnoo Monee Debia (Defendant), *Appellant,*

versus

Shohoram Sircar and others (Plaintiffs), *Respondents.*

Baboo Parbuttee Koomar Mitter for Appellant.

Baboo Bama Churn Banerjee for Respondents.

There is no misjoinder of causes of action in a suit for money contracted to be paid, and for the cancellation of a kistbundee, and for money deposited on the kistbundee.

Combined causes of action may be brought in the Court which has jurisdiction to the full amount of such combined causes of action.

THE pleas urged before us in this special appeal are:—

1st.—That there is such a misjoinder of causes of action that a suit could not lie; and that this being a matter of jurisdiction can now be pleaded at this or any other stage of the proceedings. The case of Dhurun Rowut, 15th May 1863, Hay's Reports, p. 585, is cited in support of this plea.

2nd.—That the Lower Appellate Court has erred in making the special appellant, Kinnoo Monee, liable for money lodged with Bykuntnath.

On the *first* point we are of opinion that, in fact, there is no such misjoinder of causes of action as to bar the suit. On this the Lower Appellate Court found as a fact that the kistbundee was executed, and given to defendant Bykuntnath, and the deposit paid on that kistbundee was received and misappropriated by Kinnoo Monee, and that plaintiff was for five years her tehsildar, and that she never appointed any other. The Principal Sudder Ameen further found that the kistbundee concentrated the two branches of the whole claim, *viz.*, the contract and the deposit, and made it one cause of action; and that, therefore, there was no misjoinder.

In this view we concur, and we think the Principal Sudder Ameen is right.

It has been recently ruled by a Full Bench that combined causes of action may be brought in the Court which has jurisdiction to the full amount of such combined causes of action. Here we have a suit for the recovery of a sum contracted to be paid, and for cancellation of a kistbundee alleged to have been executed, under duress, also for a sum of 200 rupees deposited *on account of that kistbundee.*

In this case, it is not denied that Bykuntnath and Kinnoo Monee are husband and wife living together; and it is quit legal presumption (not rebutted here by unsupported plea of the wife being a sepa manager for her husband) that she, the Kinnoo Monee, received the deposit, an therefore liable to restore it. In this we dismiss the special appeal with costs.

The 10th July 1865.

Present:

The Hon'ble W. Morgan and Shumbhoo Pundit, *Judges.*

Mortgage—Equity of redemption—Tende mortgage-debt out of Court—Costs.

Case No. 694 of 1865.

Special Appeal from a decision passed by Judge of West Burdwan, dated the December 1864, affirming a decision pa by the Moonsiff of that District, dated 26th September 1864.

Dinonath Butobyal (Plaintiff), *Appellan*

versus

Womachurn Roy and others (Defendant *Respondents.*

Baboo Banee Madhub Banerjee for App lant.

Baboo Gopal Lall Mitter for Responde

A purchaser of the right of redemption of a mort may sue without tender out of Court of the mort debt to the mortgagee. The tender of the mone of Court only affects the purchaser's right to recov costs.

REGULATION XVII. of 1806, which ap to *by-bil-wuffa* sales, does not affect case. The special appellant is a purch of the right of redemption of a mortga and he says that, having tendered the due to the mortgagee in possession to w the usufruct was given in lieu of inte and the mortgagee having refused to ceive the same and to return the prop he brought this action, and offered to de the money in Court. The Court of instance refused to receive it, and dismi the case on grounds mentioned in its d sion. The Lower Appellate Court confir the order, on the ground that no such ac could be maintained without offer of money out of Court to the mortgagee. Courts below are wrong. The plai special appellant, had full right to sue redemption, and whether he had or had tendered the money to the mortgagee be he sued are matters only affecting the r

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of the plaintiff to recover his costs. If the special appellant succeeds in establishing that he offered the money to the mortgagee out of Court, he is entitled to recover the property. If he had asked for this, he might have been entitled also to recover, from the time of the offer, the proceeds in excess of the interest of 12 per cent. and costs of collection. In this case the plaintiff will be entitled to recover his costs. If he fail to establish the previous offer, he will still be entitled to obtain a decree for possession, and the decree may be executed by him on his depositing the money due within a certain time to be fixed in the decree; but he will not be entitled to recover the costs. We remand the case to the Lower Appellate Court to try the appeal with reference to the aforesaid remarks.

The 10th July 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Evidence—Act IV. award, without possession, is not conclusive proof of title.

Case No. 1004 of 1865.

Special Appeal from a decision passed by the Judge of Mymensing, dated the 16th January 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 31st August 1864.

Joogul Kishore Shaha and others (Defendants), *Appellants,*

versus

Bij Kishen Surmah and others (Plaintiffs), *Respondents.*

Baboos Sreenath Banerjee and *Chunder Madhub Ghose* for Appellants.

Baboos Anund Chunder Ghossal and *Kalee Mohun Doss* for Respondents.

An Act IV. award is not sufficient proof of title when the person in whose favor it is given does not maintain possession under the award before the Survey Authorities, and allows his adversary to take actual possession.

This suit has been already once remanded by the Judge of Mymensing with specific orders that he will not consider an Act IV. of 1840 award as conclusive proof of the plaintiff's title, however long ago it may have been passed; but will decide the disputed question of plaintiffs' title being superior to defendants' title after carefully examining the whole of the evidence adduced by both parties. The Judge has again determined that the plaintiffs' title is conclusively proved by the Act IV. award; and that such an award, not having been set aside by any decree of a competent Court, is final and binding upon defendants. There seems to be no doubt that the plaintiffs obtained an order under Act IV. of 1840 in the year 1255. They have chosen not to maintain their right to possession under that award, and now sue to recover the possession which they have lost. The plaintiffs must, in such a case, prove their title; and, although the fact of the defendants' acquiescence in that award, as far as it is to be inferred from defendants not having sued to set it aside, may be strong evidence in favor of plaintiffs' title, it does not follow that it is conclusive evidence. The defendants were not bound to bring a suit to set aside an Act IV. award if they obtained possession of the disputed land peaceably without any suit. The Survey Authorities have stated that they found the defendants in possession, and have demarcated the land as belonging to the defendants' estate. The plaintiffs cannot now, in suing to oust the defendants and to recover possession for themselves, refer to the Act IV. award which gave them only possession as any final proof of their title. The plaintiffs were bound before the Survey Authorities to have maintained their possession; and, had they produced the Act IV. award before them, they would, undoubtedly, have been maintained in possession. The plaintiffs allowed the land to be demarcated in the defendants' estate, and they now admit that they have allowed the defendants to take actual possession. Their vakeel states that the demarcation was obtained by fraud, and the possession by force; but there seems to have been no evidence offered on these points before the Judge, and no distinct allegations on them in the plaint. Such statements cannot, therefore, avail the plaintiffs. It is doubtful whether they would avail the plaintiffs under any circumstances, except, indeed, in the case of a possessory action under Act XIV. of 1859. The plaintiffs, before they can succeed in their present suit, must satisfy the Judge that their title is superior to that of the defendant; and the Judge is again directed to try this question, not as conclusively decided by the Act IV. award, but on the whole of the evidence adduced by the parties, treating the Act IV. award as only a portion of the evi-

dence, proving that, at the time it was passed, the plaintiffs were found in possession.

The decision of the Judge is reversed, and the case again remanded for re-trial. It is requested that the case be taken up out of its turn, and decided with as little delay as possible.

The costs of this appeal will follow the final judgment in the suit.

The 10th July 1865.

Present :

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Mortgaged property (pledged as security to two share-holders)—Right of both to sell separately—One not prejudiced by act of other.

Case No. 145 of 1865.

Regular Appeal from a decision passed by the Judge of Patna, dated the 24th January 1865.

Indurjeet Koonwur (Plaintiff), *Appellant,*

versus

Brij Bilas Lal and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Kishen Succa Mookerjee* for Appellant.

Mr. C. Gregory for Respondents.

Suit laid at rupees 8,162.

A mortgaged property burdened with the payment of an entire debt to two shareholders is liable to sale at the instance of both creditors separately, so long as their claims remain unsatisfied.

The act of one of two holders of a bond cannot destroy the lien of the other on property pledged to both as security for a joint debt.

THIS was a suit to recover principal and interest on a bond under the following circumstances.

The plaintiff (appellant before us) sues as widow of Shunkur Dutt, and guardian of his minor son Kalee Narain. One Brij Bilas owed money to Shunkur Dutt, and gave him a bond, dated 8th July 1853, wherein he pledged an 8-annas share of certain mouzahs as security for payment.

After Shunkur Dutt's death, his widow, for some reason which is not patent on the pleadings, induced Brij Bilas to renew the bond in her name, giving back at the same time the old document. This bond to Indurjeet, and on which the present suit is brought, was dated in May 1861.

In the interim, however, Hureehur Pershad, the brother of Shunkur Dutt, sued the widow for a half-share of all the propertie on the ground that he and his brother we in joint possession thereof, and got a decre he then sued Brij Bilas on the origin bond granted to Shunkur Dutt in 1853, an got a decree for a moiety of the amount. execution, he attached and brought to sa the lands mentioned in the bond.

The plaintiff Indurjeet then endeavou to recover her half of the bond debt in same manner, but was met by the auctio purchasers under the former sale, who o jected that the same lands could not be s twice for the same debt.

The Judge has decided that a power- sale under a mortgage, once exercised, can survive so as to warrant a second sale of same mortgage-property. He decreed, the fore, against Brij Bilas, who had not d fended the suit, and released the auctio purchasers from liability.

It is urged in appeal that the mouzahs question being mortgaged for the entire de due to Shunkur Dutt cannot be release from liability until that debt be paid in fu and that the auction-purchasers in this ca bought their title, *i. e.*, Brij Bilas's rig and interests, knowing that the lands w mortgaged for the entire sum due on bond, and that there was still a moiety o remaining unpaid.

We have no doubt, looking to the wor of the second bond (the only one filed), w is admitted on all hands to be a counter of the original one, and to represent it continuing security, that the entire sh of Brij Bilas in the lands in question mortgaged for the entire sum due on bond, and that both owners of that secu were entitled to proceed against the m gaged property, until the debt was liquida in full. The mere fact of Hureehur ha taken out execution, and sold the mouzah question in satisfaction of his own mo of the bond, could not possibly affect rights of the other shareholder, the less so the auction-purchasers had due notice of t lien that still remained on the land; a when they bought the judgment-debtor's terests in it, they knew that there was s a claimant behind, whose dues had not be satisfied, but which would eventually ha to be satisfied from the land which they ha bought. The small price at which th purchased the property corroborates th proof of their knowledge of this fact.

It appears to us, therefore, that, so far, th auction-purchasers have no claim to indu gence, and that the mortgaged property, bei

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burdened with the payment of the entire debt, was rightly liable to sale at the instance of either creditor, so long as their claims remained unsatisfied; and that, as Hureehur Pershad had the mouzahs put up to auction on account of his share of the bond only, with notice that there was yet another share unsatisfied, only a proportionate share of Brij Bilas's rights and interests was sold, and that the remainder was left to make good the claim still outstanding.

There remains one point for consideration, and that is whether Hureehur Pershad and the appellant, Indurjeet Koonwur, should not be considered as holding under separate and distinct mortgages, in which case Hureehur's sale under his prior mortgage would have the effect of extinguishing the second mortgagee's rights over the property, and leave her to get her money from Brij Bilas as she best could.

A decision of the Agra Court of the 22nd December 1856 has been brought to our notice, in which that Court, under circumstances similar to the present, refused to allow the mortgagee to execute his decree against the property which had been sold in execution of a decree obtained by his co-mortgagee; but we do not assent to the ruling there laid down, for we consider that the act of one of two owners of a bond cannot destroy the lien of the other on property pledged to both as security for a joint debt.

We think that the two joint-holders of Shunkur Dutt's property must be considered as joint-mortgagees of the mouzahs in question, and that there is nothing in the bond given by Brij Bilas to Indurjeet Koonwur which makes it a separate and distinct instrument, conferring separate rights. It is stated in that bond that the terms of this instrument are the same as those of the original bond, and it is not denied that the latter deed was of the nature of a continuing security, and was referable in all its provisos to the one given to Shunkur Dutt himself. We see, therefore, no reason why the fact of Hureehur Pershad's having taken out execution under the original bond should make his lien on the mortgaged lands a separate and distinct transaction, or do away with rights which were at first contemporaneous with his own, and which were never anything more than nominally posterior to them.

We consider both bonds to be in effect one and the same instrument, and that the lands pledged in both were and are liable *quantum valeant* until the bond-holders are both of them satisfied. The auction purchasers bought the rights and interests of Brij Bilas, the judgment-debtor, knowing that there was still a further claim against the estate; and there seems to be no reason why they should not suffer what they must have known would be the consequences of their acts.

We think that the lands pledged are still liable, and that the decree should not only run against Brij Bilas personally, but against his property also The Judge's order is, therefore, reversed, and the appellant will, in execution of her decree, be allowed to take in execution the mortgaged lands, and sell the judgment-debtor's rights in them, unless the auction-purchasers, to save their property, choose to liquidate the claim.

The 10th July 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Jurisdiction—No suit for rent in respect of land taken by Government for public purposes.

Case No. 731 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Jessore, dated the 21st December 1864, affirming a decision passed by the Moonsiff of that District, dated the 18th May 1864.

Ram Chand Bhudro and another (Plaintiffs), *Appellants,*

versus

The Collector of Jessore and others (Defendants), *Respondents.*

Baboo Motee Lal Mookerjee for Appellants.

Baboo Kishen Kishore Ghose for Respondents.

A suit for rent does not lie against the Government in respect of land taken by Government for public purposes.

THE plaintiff sues for rent. No contract exists between himself and the Government. It had taken in lease neighbouring lands of others, and had at one time expressed a desire to lease the lands in dispute, including the shares of the plaintiffs as well as their co-sharers; but, claim being laid by another party under a mokurruree lease (granted, however, it is said, by the special appellants by their other co-sharers), the property was abandoned, and the lands taken under the powers possessed by the Government for acquiring land for public purposes. The

case regarding the valuation is still pending before the Collector. The special appellants have no right to sue for rents. There was no contract, and accordingly no breach of contract: and this is not a case for any breach or for specific performance of any contract.

The special appellant urges that all the formalities required by the law for taking lands for public purposes have not been observed. Granting that the complaint is just, this is not a suit in which it is necessary to take this objection into consideration. For the period intervening between the taking of the lands, and the determination of the matter pending in the Collectorate, the special appellant will get from the Government, in return for the intermediate loss owing to the use made by the Government of the lands in dispute, interest upon the value that may be hereafter assessed and fixed. There being, therefore, no ground for granting the special appeal, it is dismissed with costs.

The 11th July 1865.

Present:

The Hon'ble G. Campbell and E. Jackson, *Judges.*

Order of remand exceeded when Lower Court re-opens a question already decided.

Case No. 436 of 1865.

Special Appeal from a decision passed by Baboo Gunga Churn Shome, Principal Sudder Ameen of Behar, dated the 23rd November 1864, affirming a decision passed by the Sudder Ameen of that District, dated the 21st August 1862.

Chinta Sahoo (one of the Defendants), *Appellant,*

versus

Shah Fiazaddoon Ahmed and others (Plaintiffs), *Respondents.*

Baboos Dwarkanath Mitter and *Khetter Nath Bose* for Appellant.

Mr. C. Gregory for Respondents.

Suit by *A* to recover possession of land from *B*, who claims to hold under a lease from *C*. *B's* lease from *C* was decided to be genuine, but the case was remanded to the Lower Court to try whether *A* or *B* was in possession when the lease was given. HELD that the Lower Court, in deciding that *A* was in possession at the time in question, went beyond the order of re in re-opening the question as to the authenticity o lease, and declaring it to be invalid.

THIS is a suit to recover possession of tain landed estate which is admittedl the possession of the defendants, and w they claim to hold under a lease from Lallun Bebee, dated so far back as the 1827. The plaintiffs claim the land as of Eradut and Nowazush Hossein, and parently deny that Lallun Bebee ever any right or interest in the estate. lease from Lallun Bebee has already finally decided to be a *bond fide* genuine d ment; but the case was remanded on a vious special appeal, in order that the might be decided as to whether the plai or Lallun Bebee was the owner of the perty in the year 1827, when the lease given. The Principal Sudder Ameen held, from evidence relating to the year and subsequent years, that Eradut and N azush Hossein were the proprietors of estate, and he has gone beyond the orde remand in re-opening the question as to authenticity of the defendants' lease, declaring it to be invalid.

This is objected to in special appeal, the objection is, we think, valid. The has been already finally decided to be a and genuine document, and there is longer any doubt as to defendants' po sion under that lease. The only que which remains to be adjudicated, and the decision of which the case was rem ed, relates to the title of the plaintiffs in year 1827. It is for the plaintiffs to sa the Court that in that year they were proprietors of the disputed estate. It not follow from the fact that they were prietors in 1837, that they were also prietors in 1827. It is said here, and contradicted, that Lallun Bebee was mother of Eradut and Nowazush Hos If so, it is quite possible that she may been the owner of the estate in 1827, her sons have succeeded to it between date and 1837. We have, therefore, onl remand the case in order that the Princ Sudder Ameen may re-try the ques which is at issue, *viz.*, who was the l owner of the estate in the year 1827? issue involves an enquiry as to the manne which, and the date when, the plaintiffs quired their title; and we think it right a to impress upon the Lower Court the cau which this Court previously recorded, that the Principal Sudder Ameen sho watch very narrowly the proofs adduced

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the plaintiffs, who claim in opposition to the act of Lallun Bebee, when they and their predecessors have so long acquiesced in the existence of the lease, and when, no doubt, the consideration for the lease found its way to the family. We regret to observe that the remark of the Court has been altogether thrown away upon the Principal Sudder Ameen, who has, in fact, decided the case without even clearly ascertaining what the case before him was.

The costs of this appeal will follow the final judgment in the case.

The 12th July 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Evidence (of title and possession)—Receipts of payment of Government revenue.

Case No. 556 of 1865.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 15th November 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 22nd February 1864.

Ram Deo Narain (Defendant), *Appellant,*

versus

Ram Lall Chowdhry (Plaintiff), *Respondent.*

Mr. A. F. Lingham for Appellant.

Baboo Debendro Narain Bose for Respondent.

Receipts of payment of Government revenue are not sufficient evidence of title or possession.

We think that this suit must be remanded. The plaintiff framed his suit in this way. He alleges that he was in possession as purchaser from Kalee Jha, and that he was ousted by the defendant. The defendant admits that the plaintiff was in possession as mortgagee from 1249 to 1255, but says that the purchase from Kalee Jha is collusive, and that the suit of the plaintiff is barred, inasmuch as he has never been in possession at any time within twelve years prior to suit. The Judge holds that the title of plaintiff as mortgagee has merged into his title as purchaser from Kalee Jha; and that, the plaintiff, in his capacity of purchaser, gives two dakhilahs of payment of the Government revenue of dates within twelve years prior to suit, the suit is not barred.

We are of opinion that the dakhilahs of payment of Government revenue are not evidence of possession. The party, be he who he may, who pays in Government revenue, gets a receipt for the same; but this is no proof whatever of title or possession. The Judge must find whether the plaintiff has been in *bonâ fide* possession at any time within twelve years prior to date of suit; if this be found against the plaintiff, his suit is clearly barred; if plaintiff can prove his possession within twelve years, the question of whether the sale by Kalee Jha to plaintiff is collusive or not must be taken into consideration and decided.

The 13th July 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Mahomedan Law—Deed of Bye-Mokasa in lieu of Dower—Possession.

Case No. 878 of 1865.

Special Appeal from a decision passed by the Judge of Patna, dated the 4th January 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 20th September 1864.

Nuseeboonissa and others (Defendants), *Appellants,*

versus

Syed Danush Ali and others (Plaintiffs), *Respondents.*

Mr. C. Gregory and *Moonshee Ameer Ali* for Appellants.

Baboo Kishen Succa Mookerjee for Respondents.

According to the Mahomedan Law, possession under a deed of *Bye-Mokasa*, executed in lieu of dower, is not necessary to its validity.

The pleaders for both the parties before us admit, and are agreed, that possession under the *Bye-Mokasa* was not a condition precedent to its validity. The deed is in lieu of dower, and is not a deed of hibbah, in which possession would have been necessary during the lifetime of the donor.

In this state of things, we find that the Judge has not thrown any doubt on the genuineness of the deed; on the contrary, we read his judgment as an acceptance of the same. But he calls it inoperative, because there was no *bonâ fide* transfer during life.

But this is an erroneus view of the law. The deed being accepted, operation follows without possession in the donor's lifetime as a natural consequence under the Mahomedan Law. We must, therefore, reverse the decision of the Judge, and must restore that of the first Court as far as the rights of the defendant under the deed of *Bye-Mokasa* are concerned.

Costs to the appellant.

The 13th July 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Review of Judgment—Admission of application for—Day for hearing—Notice to opposite party.

Case No. 536 of 1865.

Special Appeal from a decision passed by the Additional Judge of Bhaugulpore, dated the 30th November 1864, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 19th June 1862.

Parbutty (Plaintiff), *Appellant,*

versus

Khoobun (Defendant), *Respondent.*

Mr. J. Baptist for Appellant.

Baboos Sreenath Doss, Luckhee Churn Bose, and *Kishen Succa Mookerjee* for Respondent.

A case should not be decided on the mere admission of an application for review of judgment. After the admission of the application for review, a day should be fixed and notified for the hearing of the case so admitted to be reviewed.

When this case was previously before the Court, a week was allowed to Mr. Baptist, the pleader for the special appellant, to produce the notice by which he alleged that he would show that the notice to appear only reached the special appellant the night previous to the day fixed for hearing, and that the case was decided on the day following that, so that no reasonable time was given, but that it ought to have been so given.

Mr. Baptist informs us that he has not yet received the notice. But it is also urged that there is a patent illegality in the order of the Judge, inasmuch as he decided the case on the mere admission of the application for the review; whereas he should by law, after the admission of the application for review, have fixed a day and given notice of it for the *hearing of the case admitted to be reviewed,* which he has altogether omitted.

This objection, we think, quite valid; and we accordingly remand the case in order that due notice may be given to both parties of the day on which the hearing of the admitted review will come on, and that the case may then be decided.

Remand accordingly.

The 13th July 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton Karr, *Judges.*

Limitation—Suit for Contribution—Advances to Salt Manufacturers.

Case No. 884 of 1865.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 28th December 1864, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 30th June 1864.

Nobbo Kristo Bhunj (Plaintiff), *Appellant,*

versus

Raj Bullubh Bhunj (Defendant), *Respondent.*

Baboos Oopendur Chunder Bose and *Kedarnath Bose* for Appellant.

None for Respondent.

A suit for contribution by a person who became surety for the re-payment of advances received by him and the defendant from Government for manufacturing salt, and was obliged, in execution of a decree against him, to pay the whole sum advanced—Held to be governed by the limitation prescribed in Clause 16, Section 1, Act XIV. of 1859.

The plaintiff and defendant were engaged in manufacturing salt. They appear to have received advances from the Salt Agent for the re-payment of which the plaintiff was security. The Government, represented by the Salt Agent, sued the plaintiff for the recovery of the advances, and obtained a decree against him in March 1860. In execution, the plaintiff had to pay the whole sum advanced. He now sues his co-sharer for contribution. The Judge has held that the suit is barred, because the partnership between the parties terminated in 1857, and this suit, to which he applies the principle of Section 8 of Act XIV. of 1859, was not brought within three years from the date that the partnership terminated, and the account was struck.

We think that the Judge is clearly wrong. This is not a suit for balance of account between merchants or traders, to use the words of the law, who had mutual dealings. The cause of action in this case accrued to the plaintiff when he paid the whole of the advance made by the Salt Agent under the decree obtained by that officer. This was in 1860. This suit is instituted in 1863, or within six years from cause of action. No other limitation is expressly provided by the Act for suits of this description. Therefore Clause 16 of Section 1 of Act XIV. of 1859 applies, and gives six years from date of cause of action. The suit being clearly in time, it must be remanded for trial on the merits.

The 13th July 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Joint Hindoo Family—Settlement of disputes—Subsequent separation—Estoppel.

Case No. 138 of 1865.

Regular Appeal from a decision passed by the Second Principal Sudder Ameen of the 24-Pergunnahs, dated the 26th January 1865.

Chunder Kant Roy Chowdhry (Plaintiff), *Appellant,*

versus

Kalee Kant Roy Chowdhry and another (Defendants), *Respondents.*

Baboos Kishen Kishore Ghose and *Greesh Chunder Mookerjee* for Appellant.

Baboos Dwarkanath Mitter, Unnoda Pershad Banerjee, and *Bhowanee Churn Dutt* for Respondents.

Suit laid at rupees 42,526-15as. 1 gd.

Disputes between members of a joint family regarding certain moveable and immoveable property respectively claimed by each exclusively were settled by compromise and abandonment of claims against each other, the deed executed on the occasion simply reciting that the disputes had been settled, and providing for the family continuing joint as regards the ancestral immoveable estates, and laying down certain rules for the future management and the safe custody of the proceeds of such property. The family having afterwards separated, it was held that the deed of compromise did not thereby become inoperative, so as to revive matters intended and understood to have been finally adjusted by it.

We have heard the pleaders of the appellant twice, and also the appellant himself; and, after a careful consideration of the circumstances of the case, are satisfied that the decision of the Lower Court is right.

The fact of the existence of the Government papers held by the brother of the appellant was known to him before the ekrarnamah was executed; and it is asserted by the defendants, and not denied by the appellant, that he also now has similar papers, and had them when he made his claim before the arbitrators, to the effect that the papers held by his brother, who was the Manager, belonged to the joint estate. The arbitrators failed to decide the disputes existing between the parties, but these Government papers must necessarily have been one of the subjects of contention.

Subsequently, at the intervention of some mutual friends, the ekrarnamah was executed in triplicate, and registered. It was a deed providing for the future management of the joint properties, and it recites that its object is to terminate disputes; that the joint ornaments belonging to the family (as distinguished from those kept joint for the use of the family idol) are divided; that each party is allowed to hold as his own, whatever cash, ornaments, wealth, garden, lands, farm, and zemindaries he has, and has purchased himself; and that no one thereafter will be entitled to urge any claims against another for any "*tuhweel,*" or cash balances of *previous years.* The claim of the appellant to participate in the Government papers held by his brother is based on the assumption of their having been purchased from the proceeds of the cash balances of the previous years charged to have been misappropriated by him. The words of this portion of the deed are large enough to include the Government papers held by the appellant's brother, and by the appellant himself. The fact, that this deed in the recital speaks only of the immoveable joint property, is explained by showing that all disputes regarding moveables claimed by each other had been settled, either by division or by abandonment of claims. There was no necessity to make any provision in the deed with regard to them, because they did not require any rules for future management of them. It was, however, necessary to provide rules for the custody and safety of the future proceeds of the joint lands, and the deed provides for them. The idea of the Government papers, held by the brother of the appellant, having been taken or supposed to form a portion of the joint estate, is out of the question. In that case,

the deed would have either provided some rules for the safe custody of them, or for drawing the interest due upon them. The appellant himself does not carry his case so far. He knows the difficulties that in this way lie before him. He simply speaks of the disputes being suspended for the time that all agreed to live together, and urges that the claim revived to him after his separation. He does not, however, consider that the papers held by him before the separation, as far as the defendants are concerned, would also become liable to be claimed as joint. The idea of the suspension of the disputes regarding the claim by the plaintiff respecting these papers is inconsistent with any settlement of disputes, and the whole scope and purport of the ekrarnamah. The appellant states that it was not acted upon, and the rules for the future management may not perhaps have been strictly acted upon as regards the joint property; but it is immaterial for this case to enquire how far, and by whom, the deed in these respects was or was not acted upon. The exact quantity of the shares of each party not having been fixed by this deed, and further disputes having arisen from the misbehaviour of some of the parties concerned, another settlement became necessary, and was effected. Both parties filed petitions containing the terms of this settlement in a suit pending between them. In the petition of the appellant, it is stated that the former agreement had not been acted upon; and it is urged that the fact was correct, because, in the petition of the defendants, which was filed afterwards, this fact is passed over, though they had seen the petition of the appellant. The defendants intended to settle all disputes, desiring to put an end to disagreements; and the appellant appears to have from the first studiously adopted a policy which he thought would enable him one day to revive the claims which he is now urging, but which the defendants understood he had, by these settlements, abandoned, just as they had abandoned all claims to that held exclusively by the appellant. To an expression used by the appellant in the aforesaid petition with reference to the ekrar, it was not to be expected that the defendants, acting under such an honest belief, could, at a time when they supposed they were again settling all disputes, make any objection. They knew that, even if the ekrar had not been in all respects acted upon, the facts recited in it could not become falsehoods, and the past disputes settled by it co not be revived by any partial failure observe its terms in the management of t joint property subsequent to its executi or ever suspected that, allowing the appell to represent that the ekrar had not been a ed upon, would, notwithstanding the seco settlement, give rise to the claim n urged by the appellant. This second set ment was certainly intended to put stop to all existing differences and d agreements, and the absence in the el of any allusion to any claim to these Gove ment papers, if, as alleged by the app lant, kept suspended at the time, afte recent struggle by him before the arbit tors to claim them, and also the abse of any allusion in the subsequent soleh mah to any account of proceeds previo to the date of the first settlement by t registered ekrar, are altogether incomp hensible, unless we believe that all di putes and claims connected with the matters had been settled at the time of th execution of the ekrar. The execution the solehnamah is also inconsistent w the suspension of such a claim on the p of the appellant, and opposed to its wo ing and intention.

The joint landed property is menti ed in the beginning of the ekrar; and the list there given is not exhaustive this class of property, it is evident t at the time of the execution of the de there was no dispute regarding the numb extent, or the identity of the joint p perties. The landed properties now clai ed to be shared by the appellant are that were in existence at the time of t execution of the ekrar. The plaintiff h not proved that they were ever held joint after the ekrar of the solehnam up to the time of his separation from t other defendants. If there had been a truth in the claim of the plaintiff, he wou not have delayed so long to sue after h separation. With regard to some of the properties, the defendants denied a personal interest, and disclosed the nam of those to whom they are said by the de fendants to belong. If the plaintiff faile to make these parties defendants, or prov that the defendants in the case hold th lands, the Lower Court could not try th claim for these lands, or decree in favo of the appellant.

The defendant pleaded, and the appellant does not deny, that, just as the brother of the appellant claims for himself exclu

ively certain landed properties, the appel-
ant also held several properties exclusively
imself before the execution of the ekrar.
e nephew of the appellant, who sides
th the brother of the appellant, is no gainer
the dismissal of the appellant's case,
t might, in case of the appellant's suc-
eding, be entitled to a share of the pro-
ties claimed by the appellant, as also,
haps, of those exclusively held by the
llant. The appellant is not in a posi-
, with reference to the facts of this case
his conduct, to rely simply upon his
ts as a member of a joint Hindoo family,
so cannot expect that, by merely filing
plaint in Court, he can put the defend-
to a strict proof of the whole case, and
n a decree for participation, if the de-
dants fail to establish that any property
imed by them was acquired from their
arate funds. The defendants are ready
prove the case for the lands claimed by
m as their own; but, as they have already
wn sufficient to justify a dismissal of
appellant's case, they need not be asked
prove more. The appellant has not
ceeded before us in establishing any-
g against the correctness of the detail-
reasons given by the Lower Court for
missing his claim for each and all of the
s claimed by him.

We accordingly dismiss the appeal with
s.

The 14th July 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Guardians of Minors (Liability of).

Case No. 3034 of 1862.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 24th September 1862, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 27th December 1861.

Sheikh Azeemooddeen Ahmed (Defendant), *Appellant,*

versus

Moonshee Athur Ali (Plaintiff), *Respondent.*

Mr. C. Gregory and *Baboo Debendro Narain Bose* for Appellant.

Baboos Kishen Dyal Roy and *Bhuggobutty Churn Ghose* for Respondent.

The guardian at the time of the suit, and not the former guardian of a minor, held liable, to the extent of the funds in his hands belonging to the minor, for a debt incurred for the benefit of the minor.

THIS was a suit a recover money lent for the benefit of a minor to save his estate from sale for arrears of Government revenue, brought against his present guardian as well as his former guardian.

The Principal Sudder Ameen has decreed the claim against the present guardian; but the Judge on appeal has given a decree also against the former guardian, who now appeals specially, urging that he is not personally liable for the debt. The Judge says: "The former manager is liable, as it has been "clearly laid down that, without proof of spe-"cific authority having been granted by the "principal to borrow, or proof adduced of "similar borrowing having been formerly "sanctioned by the principal, no case of this "kind can stand." The Judge is altogether wrong in his law. The money has been found to have been borrowed for the benefit of the minor, and applied to his use. The present guardian is liable to pay the debt to the extent to which he may hold funds belonging to the minor.

The Judge's decision is reversed, and the decree of the Principal Sudder Ameen restored. The present guardian to pay all the costs of this suit.

The 14th July 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Hindoo Law—Father's debts—Sale of property inherited from another branch of the family.

Case No. 895 of 1865.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Dacca, dated the 5th January 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 18th February 1863.

Bissumbhur Roy (Plaintiff), *Appellant,*

versus

Luckhee Kant Neogy and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboos Sreenath Doss and *Kishen Dyal Roy* for Respondents.

Property inherited from another and a distinct branch of the family cannot be sold for a father's debts.

THE Court below has wholly misunderstood the point in this case. The plaintiff, special appellant before us, avers that the property, which the creditors of his father seek to make liable for his father's debts, was inherited by him, the plaintiff, from his maternal grandfather, and not from his father; and consequently that the property is not liable to be sold for his father's debts.

The Courts below appear to have held that, because the plaintiff did inherit his father's estate and squander it, any estate which may have devolved to him from another and distinct branch of the family is liable.

We cannot assent to this doctrine. The plaintiff is undoubtedly liable for his father's debts to the extent of the assets of the father's estate received by him; but, if he can prove that the property, which the creditors seek to sell, was not inherited by him from his father, but from his maternal grandfather, it cannot be sold for the debts of the father. The case is sent back for re-trial on this point.

The 14th July 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Hindoo Law—Testamentary paper—Nuncupative Will.

Case No. 876 of 1865.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 30th December 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 20th June 1864.

Tara Chand Bose (one of the Defendants), *Appellant,*

versus

Nobin Chunder Mitter (Plaintiff) and others (Defendants), *Respondents.*

Mr. R. T. Allan for Appellant.

No one for Respondents.

A testamentary paper drawn up in the lifetime of the testator, when, though very ill, he was in the full possession of his senses, and duly attested by the subscribing witnesses, who depose that it was drawn according to the instructions of the testator, and that he, in their presence, signified his assent thereto, w held to be sufficient under Hindoo Law.

THE special appellant urges that he is th nearest male heir of the late Gunga Nara Shome, and, as such, is entitled to succeed the whole of his estate; and that the test mentary paper set up by the special respon ents is informal and invalid.

Both the Lower Courts have held that th testamentary paper filed by the special r spondent is a genuine instrument, and suffi ent under the Hindoo Law.

The paper is a statement which w drawn up in the lifetime of the testator, a at a time when, though very ill, he was the full possession of his senses. The pa contains three columns: in the first colu is a recital of a debt due by the testat amounting to 200 rupees; in the seco column is a schedule of his property, real a personal; it is provided that, after payme of his debts from the proceeds of the sale his landed property, the surplus is to be a propriated, first to the payment of cert legacies to various parties, and the balan if any, for the funeral obsequies and *sradd* the testator. This paper is duly attested the subscribing witnesses, who depose th was drawn according to the instructions the testator, and that he signified, in th presence, his assent thereto.

Such an instrument is not to be tested the strict and technical rules of English l Under the Hindoo Law a nuncupative wi legal; and we have no hesitation in hold that this instrument is genuine, and that represents and embodies the intentions of t testator. In this view we confirm decision of the Court below, and dismiss th appeal with costs and interest.

The 14th July 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Sale—Unpaid purchase-money creates no li on the property sold against third parties.

Case No. 543 of 1865.

Special appeal from a decision passed by the Principal Sudder Ameen of Sarun dated the 17th December 1864, affirming decision passed by the Sudder Ameen of that District, dated the 8th July 1864.

Jagoo Koonwur (Plaintiff), *Appellant.*

versus

Jubutty Koonwur and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Kalee Kishen Sein* for Appellant.

Baboos Debendro Narain Bose and *Greesh Chunder Ghose* for Respondents.

Persons who allow a property to leave their possession before the purchase-money is complete cannot recover from third parties who are purchasers in good faith and for valuable consideration, even if those persons had notice of the amount of the consideration-money remaining unpaid.

The facts of this case and the position of the several parties are not very clearly laid down in the judgment of either of the Courts; but, as given to us by Mr. Allan, and not denied by the respondent, they are as follow. One Dukhim Sahoo got a decree against Jiwat Sahoo, and attached his property some time in 1839. Subsequently, money was deposited by the husband of the present plaintiff in June 1839, so as to liberate the property; and the decree-holder then took the money so deposited out of Court. But Jiwat Sahoo executed a bill of sale in December 1839 to a third party, one Ji Lal, for 500 rupees, and stipulated that, of this sum, the purchaser was to pay 140 rupees cash to him, the vendor, and the remainder, or 360 rupees, to the plaintiff before Jagoo Koonwur, on account of the payment of the amount of the decree above mentioned. The plaintiff afterwards sued Jiwat and Ji Lal for the money so stipulated, and gained a decree against Jiwat alone. In execution of that decree the plaintiff attached and purchased Jiwat's rights and interests in the said sum of 360 rupees, which was in the hands of Ji Lal, and, having become the holder of that right, now institutes the present action against the heirs of Ji Lal, and the purchasers from his heirs, the defendants in this suit.

The defendants' case is that they purchased in good faith from Mohabir, the heir of Ji Lal; that they knew nothing of the sum claimed as part of the consideration-money; and that they are not liable, as no trust was created.

The Lower Appellate Court amending the decree of the first Court has given the plaintiff a decree only against Bissessur, the heir of Ji Lal, but not against the defendants, purchasers of the rights in the property.

The appeal is made to enable the plaintiff to follow the property in suit, which is a house, and to make the respondents liable for the sum unpaid out of the consideration-money of 360 rupees, with interest of the same amount.

The respondents urge in bar to the appeal that the time has expired; that the plaintiff should have realized from the original vendor; and that the suit cannot proceed against them. This point was never taken in the Lower Courts, and we do not think it right at this stage to admit such a plea which might easily have been taken at an earlier stage.

But the point remaining for our consideration is, whether the unpaid amount of the consideration-money creates a lien in favor of the plaintiff on the property sold, and whether she can follow the same into the lands of third parties, purchasers from the original proprietor.

After full consideration, we are of opinion that no trust was created by the deed of sale, and that persons who allow a property to leave their possession before the purchase-money is complete cannot certainly recover from third parties who are purchasers in good faith and for valuable consideration, even if these persons should be held to have had a notice of the amount of the consideration-money still remaining unpaid. The plaintiff's only remedy is against the original vendor and his direct heirs. In this view, we see no cause for interference, and dismiss this appeal with costs.

The 14th July 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Principals and Agents—Promissory Notes—Evidence.

Case No. 907 of 1865.

Special Appeal from a decision passed by the Judge of Sarun, dated the 25th January 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 18th September 1862.

Sheo Churn Sahoo and another (Defendants), *Appellants,*

versus

Mr. G. Curtis (Plaintiff), *Respondent.*

Messrs. G. C. Paul and *R. T. Allan* and *Baboo Onoocool Chunder Mookerjee* for Appellants.

Mr. S. E. Collis for Respondent.

If an agent signs a promissory note without disclosing the names of his principals, the latter are not liable, and no parol evidence is admissible with a view to establish their liability.

THE Judge is clearly wrong in holding that the special appellants are liable. Messrs. Hoare, Miller, and Co. of Calcutta sold certain estates to one Phulleram, who represented himself to be the gomashtah of the special respondent. Phulleram signed a promissory note for 1,725 rupees payable to Messrs. Hoare, Miller, and Co., who sold it to the plaintiff, Mr. Curtis.

The special appellant's Counsel contends that, as the principal's name does not appear on the promissory note, his client is not liable; and, further, that no Mahajunee usage has been proved which would bind his client.

We find that the gomashtah, whether he was in the employ of the special appellant in that capacity or not, which is disputed, signed the promissory note without disclosing the names of his principals. They are, therefore, not liable, and no parol evidence is admissible with a view of establishing their liability. (*See* Byles on Bills of Exchange, page 97, quoted by the learned Counsel, Mr. Paul.)

No Mahajunee or Bazar usage has been proved in operation of the above principle.

The appeal is decreed with costs and interest.

The 17th July 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Hindoo Law—Inheritance—Streedhun—Immoveable property inherited by mother from son.

Case No. 932 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 27th January 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 20th May 1864.

Punchanund Ojhab and others (Defendants), *Appellants,*

versus

Lalshan Misser and others (Plaintiffs), *Respondents.*

Baboos Dwarkanath Mitter and *Unnoda Pershad Banerjee* for Appellants.

Baboo Kishen Succa Mookerjee for Respondents.

According to the Mitakshara and the Vivada Chintamonee, *all* property that a woman inherits does thereby become *streedhun*, so as, after her death, descend to her heirs. Immoveable property which, default of other intervening heirs, has been inherited a mother from her son, descends on the moth death, not to her heirs, but to the heirs of the son fr whom the mother inherited it.

THE point raised on this appeal is wh ther landed estate which, in default of oth intervening heirs, has been inherited by mother from her son, descends on mother's death to her heirs, or whether descends to the heirs of the son from wh the mother inherited it. There is no questi as to the law which prevails in Bengal. is admitted that the son's heirs will inh in Bengal, and that the mother posses only a life-interest in the son's estate simi to the interest possessed in her decea husband's estate by a widow. But it said that the Mithila and Mitakshara La differ from that prevalent in Bengal up this point; and that, according to those la the estate inherited by a widow from husband, and by a mother from her thereby becomes her *streedhun;* and the heirs, after the widow's or the moth death, are the widow's or mother's heirs, not the heirs of the husband or the son.

Baboo Dwarkanath Mitter, who com for this view of the law, supports it by Mitakshara Chapter on Streedhun, pp. to 867, Colebrooke's Edition, and by Ba Prosunno Coomar Tagore's Translation of Vivada Chintamonee, in which the auth of that work gives a table of succes according to the Mitakshara. The vake on the opposite side rely upon the Chapter of Mitakshara Law as proving correctness of their views, and allege the remarks of Baboo Prosunno Coo Tagore, even if they are to be read the opposite side would read them, opposed to the text as laid down in p 261, 262, and 292.

The eleventh Chapter of the Mitaksh details the different sorts of property whi come under the denomination of *streedhun,* the separate property of a woman. The fi Section details it to consist of all gifts made a woman by her father, mother, husband, brother, or received by her at her marriag or on her husband's second marriage, or a other separate acquisition. The seco Section repeats this definition, and, inste of the words "separate acquisition," it ad

"also property which she may have acquired by inheritance, purchase, partition, seizure, or finding, are woman's property." The third Section lays down that the term woman's property conforms in its import with its etymology, and is not technical: for, if the literal sense be admissible, a technical acceptation is improper. The fourth Section goes on to say that the enumeration of the different sorts of woman's property, as above given, is not intended as a restriction of a greater number, but a denial of a less. Baboo Dwarkanath Mitter especially relies upon these passages as proving that all estate which devolves upon a mother or widow, even by inheritance, thereby becomes streedhun according to this law; and he further points to the eighth Section as showing that, after the death of the mother or the widow, her heirs take it. "Her women take it, if she die without issue." Subsequent Sections lay down who her women are. In the Vivada Chintamonee, Chapter on the Table of Succession prepared by the Translator, Baboo Prosunno Coomar Tagore, in the 12th Rule, the following is laid down: "Any property which a woman inherits is her *streedhun*, that is, peculiar property. Hence any property of her husband which she inherits shall, on her death, be received by the heirs of her peculiar property. But such property cannot, according to the *Smritishara*, be her streedhun. Hence the heirs of her husband shall receive it. If the mother die after inheriting her son's property, such property becomes her streedhun. Hence the heirs of her peculiar property get it."

It would appear, then, that the above-named translator of the *Vivada Chintamonee* would make a distinction between the property which is inherited by a widow, and the property which is inherited by a mother. At least it is not quite clear, from the twelfth paragraph above quoted, whether he rejects the rule as laid down in the *Smritishara* or not. This work is one of those works upon which he relies as laying down the Law of Succession: and he points out what is the rule as laid down in that work. It may be, however, that the Translator, Baboo Prosunno Coomar Tagore, merely mentions it as a discrepancy, and adopts the general rule as Baboo Dwarkanath Mitter contends for it.

We must, however, decide the question before us on the law as laid down in the *Mitakshara* and in the *Vivada Chintamonee*. The opinion of Baboo Prosunno Coomar will be well considered; but, if it is contrary to the text, we must reject it. It seems to be quite clear, from the fact that there is a distinct Chapter in the law on the woman's separate property, that there is some distinction between the different sorts of property obtained by women. There is certain property denominated specially *streedhun* regarding the inheritance to which a different rule of succession prevails from that which prevails as regards other property. It is quite clear that the different rule of succession is laid down, not because the woman was the last owner, but because the property is of a special description, and the special description of property is very carefully enumerated, and clearly is such property as a wife or a daughter would hold during her father's or husband's lifetime, and which is specially given to her to be appropriated to her own use. But it is added that, in addition to the five or six special descriptions of property which are particularly enumerated, there may be other species of separate property which are not enumerated, and that it is not to be considered that, because only so many special kinds of separate property are enumerated, there may not be other kinds of separate property. But we think the text clearly confines *streedhun* to be some sort of special separate property. The only words which in any way militates against this view are the concluding words of the second Section of the Chapter; but we think that these are to be read in the same category with the last description of separate property given in the first Section. The words "as also any other separate acquisition" correspond to the words "also property which she may have acquired by inheritance, purchase, &c." Now, the separate property of ladies of rank in this country very often devolves on their successors by inheritance, and ladies may, with the proceeds of their separate property, acquire other property. All such would be *streedhun*. It would be separate acquisition or acquisitions of separate property by inheritance, purchase, &c. But the property of her husband or her son, to which a woman may succeed as heir for her lifetime, is nowhere laid down in the text as thereby becoming *streedhun*. If the law of the *Mitakshara* on this point was so different from that prevalent in Bengal as is contended, the Commentators would have distinctly laid down the discrepancy. As a general rule, the laws may be considered to correspond, although there are certain special points on which they differ. These points are well known; and, if it is the case

that, on a property devolving on a woman, the Mitakshara Law at once changes the whole order of succession, surely there would have been some precedents to that effect in the Law-Books. The rule laid down in Section 3 of the Chapter on *Streedhun* in the *Mitakshara*, that the words "woman's property" are not to be used in a technical sense, probably means that whatever estate really becomes the woman's property, so that she may act with it as she likes, may be considered streedhun, but not that any property which, at any time, comes into a woman's hands, even the family property in which she is allowed only a life-interest, is also *streedhun*. If this was the law, it would have been clearly and distinctly expressed, and there would have been no necessity for the description of the different sorts of woman's property which the law lays down.

The text of the *Vivada Chintamonee* is as clear upon the subject as the text of the Mitakshara. There are several pages to show what special sorts of property are woman's separate property or *streedhun*. It is nowhere laid down that all property which a woman inherits thereby becomes streedhun, and after her death is to be inherited by her heirs. The opinion of Baboo Prosunno Coomar Tagore is, therefore, we think, not supported by the text of either the *Mitakshara* or of the *Vivada Chintamonee*; and the contention of Baboo Dwarkanath Mitter must, we think, be rejected as contrary to law and precedent.

The special appeal is dismissed with costs.

The 17th July 1865.

Present:

The Hon'ble C. Steer and G. Campbell, *Judges.*

Endowment (Test of—Being bona fide or nominal).

Case No. 2 of 1865.

Regular Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 1st October 1864.

Gunga Narain Sircar and others (Defendants), *Appellants,*

versus

Brindabun Chunder Kur Chowdhry (Plaintiff), *Respondent.*

Baboos Dwarkanath Mitter and *Romesh Chunder Mitter* for Appellants.

Baboos Kalee Prosunno Dutt and *Nil Madhub Bose* for Respondent.

One test of a *bonâ fide* or nominal endowment is to see how the founder himself treated the property, and how the descendants have since treated it.

THERE is, we think, no doubt that the late Durga Ram Kur bought the property the subject of this suit, ostensively for the idol *Gobind Daib Thakoor*, of which endowment he constituted himself the *sebayet*. The plaintiff, a descendant of Doorga Ram and one of the *sebayets*, brings this suit to recover a moiety of the lands in suit, the same having been taken possession of by Kally Doss Sircar on the 23rd January 18[illegible] under a purchase made in an execution-sale in satisfaction of a decree of Kaminee Doss *versus* the plaintiff.

The question is, was this a *bonâ fide* endowment or a nominal one? If it was a *bonâ fide* endowment, the lands could not be seized and sold in execution of a decree against the plaintiff, and the plaintiff will be entitled to recover them; and if, on the other hand, it was not a *bonâ fide* endowment, it was individual property, and liable to seizure and sale for a debt of the owner.

The tests of a *bonâ fide* or a nominal endowment are, how did the founder treat this property, or how have his descendants treated it; has the income of the endowed lands been continuously applied to the object of dedication?

The endowment was made in Assar 1[illegible] by Doorga Ram. Within fifteen days from that date, the same Doorga Ram transferred to his brother Radha Churn half the endowed lands and half their income. The deed of transfer does not say that Doorga Ram makes Radha Churn the sebayet of the moiety of the lands transferred to him, and there is no warrant whatever for supposing that the purport of the deed was to create a mere trust of the moiety in Radha Churn.

We see, then, that Doorga Ram dealt with the property as his own; and, though there is nothing to show that any of his sons made similar transfers, no attempt has been made to prove that the income of the so-called endowed land has been continuously devoted to the service of the idol. There were certainly some private accounts of the plaintiff, the judgment-debtor, put in to show that the income had been spent on the idol. But the accounts are for very recent years and of three years only, and they were only produced, but were not proved. There is, therefore, nothing whatever to show that the income of the estate has been spent on the idol, and this criterion of a *bonâ fide* endowment is, therefore, entirely wanting.

We can never assent to the doctrine con- ed for by the pleader for the plaintiff, because a nominal endowment has been made, it is to be regarded as an en- ent for ever, and safe from liability the founder or his heirs, notwithstand- that they may never have spent a y on the idol, or have ceased to spend ing for a generation or more.

e, therefore, altogether disagree with Court below in the opinion it has ssed, that the lands are not liable to sale ecution of a decree against the heirs oorga Ram. It is, however, admitted the plaintiff, who is one of the heirs of ga Ram, and is not one of the debtors, titled to 1 anna out of the 8 annas which this suit is brought, and to that t he will get a decree, and the costs e parties will be regulated accordingly.

The 18th July 1865.

Present:

'ble C. B. Trevor and G. Campbell, *Judges.*

Estoppel—Admissions—Acts.

Case No. 1069 of 1865.

Appeal from a decision passed by the ditional Judge of East Burdwan, dated 31st December 1864, affirming a decision sed by the Sudder Ameen of that District, d the 29th December 1862.

rooghun Dutt (Defendant), *Appellant,*

versus

Gopal Ghose (Plaintiff), *Respondent.*

aboo Doorga Doss Dutt for Appellant.

s Mohendro Narain Bose and *Gopal Lal Mitter* for Respondent.

plaintiff and defendant both claim under *S*. The ant appealed, urging that, as S admitted the mo- ee lease of the defendant's purchaser, the plaint- bound by *S*'s admission. HELD that the plaint- not bound by any admission of *S*, though he have been by any *bonâ fide* act of *S*.

is case was remanded in order that incipal Sudder Ameen might enquire validity of Banessur Bose's mokur- lease and its purchase by the defendant. The enquiry has now been made. The Principal Sudder Ameen has given his opinion adverse to its validity, and has dismissed the defendant's appeal.

Defendant now appeals specially, urging that, as Sagoree Debia, from whom both parties claim, admits the mokurruree pottah of Banessur, the plaintiff was bound by her admission, and his suit should have been dismissed.

We see no weight in the objection of special appellant. The plaintiff was, in no way, bound by any statement of Sagoree Debia, though he might have been by any *bonâ fide* act of hers, and, as the Lower Court has found against the truth of Sagoree Debia's statement, we see no ground for interfering in special appeal, but reject the application with costs.

The 18th July 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Suit for resumption (by Manager of religious endowment).

Case No. 18 of 1865.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 19th September 1864, affirming a decision passed by the Officiating Principal Sudder Ameen of that District, dated the 26th May 1864.

Nobin Chunder Roy Chowdhry and others (Plaintiffs), *Appellants,*

versus

Pearee Khanum and others (Defendants), *Respondents.*

Baboo Sreenath Doss for Appellants.

Baboos Kishen Dyal Roy and *Mahendro Lal Shome* for Respondents.

The Manager of a religious endowment cannot sue for resumption of invalid lakheraj land.

THIS was a suit by the plaintiff (the special appellant before us) describing himself in different parts of the record as the manager of a religious endowment and as

a zemindar, to resume and assess certain land in the possession of the defendant, on the ground that it belonged to the mal lands of his *Opumchukee* estate granted by the Rajah of Cooch Behar for the service of the idol *Dhonessur*.

The defendant claimed the land as lakheraj, existing from before the time of the British Government's accession to the Dewanny.

The Judge has decided that the plaintiff was not a zemindar or proprietor of land—possessing the privileges conferred by Section 10, Regulation XIX. of 1793, but simply a manager appointed to look after the service of an idol, and to expend certain allowances derived from the rents of certain villages upon it. He considered, therefore, that he had no power or authority to sue for resumption of invalid lakheraj land. As for the rest, he found that the plaintiff had not been in possession within twelve years, or, indeed, at any time, of the land he claimed possession of, and, therefore, dismissed his suit.

It is urged specially, that the special appellant's position gave him the power of applying for the resumption of alleged invalid lakheraj land situate within the area of his mal estate, and that the Judge ought not to have treated this case as one coming under the general Law of Limitation.

With regard to the first point, we think the Judge was right. In his original plaint, the special appellant styled himself simply a manager, and it was not till afterwards in his appeal to the Judge that he claimed the *status* of zemindar. The manager of a religious endowment, consisting of the profits of a number of villages after payment of the Government revenue, can have no right either to the name or the privileges of a zemindar. He merely expends in the service of an idol the surplus profits. The zemindar, so far as the record shows us, for the special appellant produces no sunnud or grant from the proprietor, is still the Rajah of Cooch Behar who gave the endowment, and he only is in a position to sue for resumption.

This being so, the special appellant could only sue to recover the land in special respondent's possession, on the ground that he had been dispossessed of the same; and to succeed in such a suit, he must, in the first place, have proved that, some time within twelve years, he had himself been in possession. But the Judge has found, as a fact, that special appellant has been altogeth unable to show any possession at all at a previous time.

Under these circumstances, we see reason to interfere with the Lower Cou order, and dismiss the special appeal w costs.

The 18th July 1865.

Present:

The Hon'ble H. V. Bayley and C. Steer *Judges.*

Suit for joint-possession by Co-sharer—Rig of lessee of other Co-sharers—Adverse p session—Limitation.

Case No. 74 of 1865.

Regular Appeal from a decision passed the Principal Sudder Ameen of Moors dabad, dated the 23rd December 1864.

Jardine, Skinner, and Co. (Defendants), *Appellants,*

versus

Ranee Shama Soonduree (Plaintiff), *Respondent.*

Messrs. R. T. Allan and *J. S. Rochfort* *Baboo Onoocool Chunder Mookerje* Appellants.

Baboos Kishen Kishore Ghose, Sreenath D and *Nuleet Chunder Sein* for Respondent.

To bar the right of a partner, an adverse posse of separate proprietorship must be pleaded and blished by the co-partners, and not by a lessee fr co-partners, much less where the lessee's lease h pired.

A lessee cannot claim to be considered a tenan virtue of a right of occupancy if he has never pl such a right, and after he has denied the landl right altogether.

Suit laid at rupees 16,703-12-2g. 2c.

THE plaintiff, the widow of Mob Narain, describing herself as a 2 annas gundahs shareholder in turuf Bungsh buddunpore, sues to recover joint posses with her co-partners in the turuf of a c of considerable extent which is included the turuf.

One of the co-sharers makes no appearan Another admits the plaintiff's right; but J dine, Skinner, and Co., who hold, or did h a lease from the Court of Wards, acting

behalf of the plaintiff's co-sharers, when they were in their minority, without actually denying the plaintiff's allegation that she is co-sharer, raise various pleas in bar, *i. e.*, allege that they hold the lands as lessees under the proprietors; that they have held them for 20 years, paying the proprietors the stipulated rent; and that, the plaintiff not having been in possession at any time within five years from the institution of the suit, the suit is barred.

It appears that this same plaintiff brought suit some years ago against the co-sharers and Jardine, Skinner, and Co., alleging that the estate which belonged to him and his co-sharers had been partitioned between them: and in that suit he claimed to have a separate share in the lands for which he now sues for possession in conjunction with his co-sharers. It was ruled in that former suit that the plaintiff had given no reliable evidence of a partition, so that his claim to the exclusive possession of the land in dispute could not be decreed; but it was fully conceded that he was one of several sharers who were in joint possession of the estate.

Thus, his right to be considered one of the proprietors has already been placed beyond all dispute, independent of the evidence produced in this suit; and, unless he is barred, there is no other order which can be made in this suit than to award him the joint possession which he now seeks. That possession has been awarded by the judgment of the Lower Court with mesne-profits from the date of alleged dispossession.

Jardine, Skinner, and Co., the lessees of the other co-sharers of the plaintiff, alone appeal, and the plea of their Counsel is, as it was in the Court below, that the plaintiff's suit for possession is barred. The argument of the Counsel is that, inasmuch as the appellant was the lessee of the plaintiff's co-sharers and of their shares only, he was, in regard to the plaintiff, a trespasser; and, as such, he can plead adverse possession and thus the Law of Limitation as a bar to the plaintiff's action. Possibly there might be something in this argument, but it is not in the light of a trespasser that Watson has made answer to the suit. His contention before the Lower Court, and even in his written grounds of appeal to us, has been that he was in possession of the lands in dispute as the lessee under a lease from the plaintiff's co-sharers. As such lessee, he joined issue with the plaintiff whether, by his previous possession for more than twelve years, the plaintiff's right of action was not barred. He never said, as his Counsel now puts the case for him, that his lease from the co-sharers gives him no right to take possession of the plaintiff's share; but, in other words, that he was in respect to the plaintiff a wrong-doer, and, as such only, in adverse possession of the plaintiff's share. Had he said this in his answer, the plaintiff would have known probably how to meet the case, but he was not called upon to meet such a case, and we cannot allow the ingenuity of a pleader to change the whole nature of the case, and to raise a question in appeal which does not arise out of the case as the parties elected to put it in their pleadings.

Another way that the pleader for the appellant attempts to make out, that the plaintiff is barred from the remedy he seeks, is that, as he, the appellant, has been in possession for more than twelve years of the lands in dispute as farmer under a lease granted to him by the plaintiff's co-sharers, when they were in sole possession; and as, within that period, the plaintiff brought no suit to establish his own right, or to question the act of his co-partners, or to disturb the appellant, his right to do so now has lapsed, and the appellant cannot be turned out of possession of the share belonging to the plaintiff so long as his lease lasts.

It is to be borne in mind that it is not the plaintiff's co-sharers who contest the plaintiff's right to joint possession; but a party who holds a farm acquired from the co-sharers. The latter do not plead that the plaintiff's right to take possession jointly with them is barred; and, unless the appellant had raised the objection, the plaintiff's suit would have been decreed as a matter of course. Is it then competent to the appellant, as a farmer only, to say that the plaintiff, whose right to a proprietary share in the farmed estate is either admitted, or not denied by his co-sharers, is not entitled to joint possession with them, because he has not sued within twelve years? We hold that he cannot say that the plaintiff's right of suit is barred by statute. He is competent to say: "I allow "that you are a part proprietor of the estate "which your partners leased to me, but as "you have allowed me for twelve years "to keep possession of my farm, you have "acquiesced in the act of your co-partners, "and time has now put it out of your power "to object to it, or to disturb me in my "possession." If a lessee in a joint co-parceny estate could successfully use such a plea, it would, in fact, be a lessee disputing his landlord's title. The appellant then

cannot say that the plaintiff is barred from suing for joint possession under the Statute of Limitations; for a proprietor in a joint estate held in common could only be barred, if those who were his co-sharers had dealt with the estate for twelve years so as to show that they dealt with it as their own, and so dealt with it as utterly to destroy the presumption that they were acting in their capacity of managers or trustees for the whole body of the proprietary. To hold a party, who was allowedly a partner, to be barred of his right of a partner, an adverse possession of separate proprietorship must be pleaded and established by the co-partners; and, unless they plead it and show it, one, who, like the appellant, is a leaseholder merely under the proprietors, cannot, even if he can be allowed to show that the plaintiff has exercised no acts of ownership for twelve years, be considered in a position to plead that there has been adverse possession, such as will bar the claim of the plaintiff to his rights of a proprietor.

But, supposing that the appellant could have said: "You have constructively ratified "the act of your co-partners in granting me a "lease, and inasmuch as I have held without "let or hindrance from you for twelve "years, you cannot now assert a right, the "effect of which will be to turn me out," as a matter of fact he has not said this. Instead of admitting, as such an argument would imply, the right and title of the plaintiff as a co-sharer, the appellant has most strenuously denied that he has any right or title, and he cannot, while he has all along denied it, now say, "I am your lessee, "and you are bound so to consider me." Moreover, it was distinctly stated by the plaintiff in his written statement, and as distinctly repeated by the plaintiff's agent in his oral examination, that the lease which the appellant held has expired. This has never been contradicted by the appellant. No evidence was adduced to show that the lease was still in force, nor has the deed of lease been ever produced with this object. Therefore, even if it is allowed that the plaintiff could not turn the appellant out so long as the lease had not expired, it was clearly the duty of the appellant to rebut the statements opposed to him in this matter, by proving that his lease had yet to run, but he did not prove this.

As a last resource, the pleader for the appellant brings to his help the established facts of this case as showing, as he thinks, the equitableness of considering him in the light of a tenant of the plaintiff. He held, he says, these lands from and under t plaintiff's co-sharers at a time he had eve reason to suppose that the estate vest in them and them alone; he has held t lands for 20 years, and has paid the co-share the full and stipulated rents, and he thi it will be very hard if, after such a length possession, he is to be deprived of t occupancy of the lands. But he has ne pleaded a right derived from a right occupancy. He cannot, in one breath, to the plaintiff, "you have no right of la lord in this property," and, in the next, t "you have such a right, and you are bou to consider me as your tenant, and that a long past period." Hs had his electio and he chose to deny the plaintiff's ri altogether, and he cannot, now that plaintiff's right has been established, tu round and say, "be it so, still you mu acknowledge me as your tenant."

On a review, then, of all the facts of t case, we cannot admit the arguments broug forward by the pleader for the appellant and we see no reason to disturb the jud ment of the Lower Court, that the plaint is entitled to a decree in the terms he pr for, that is, a decree for joint-posses with his co-sharers of the estate the sub of dispute.

In regard to wasilat, which the L Court has awarded from the date of alleged dispossession, *viz.*, from the December 1852, we think that, with ence to what has been ruled as the pr practice in such cases, the plaintiff ca recover wasilat from any date earlier t six years from the date of the institutio this suit, and we amend the decree of Lower Court accordingly, and the cos suit will be reduced proportionally.

The Principal Sudder Ameen has we think, erred in giving the costs Mussamut Soometra Debee against appellant. This person is one of plaintiff's co-sharers, and was made a defe ant for the purpose, it seems to us, aiding the plaintiff by an admission of right. It was not necessary for her to any answer at all; and, as it is quite c with what object it was filed, we do consider it equitable that the appell should be saddled with the costs of a pa who was improperly made a substan defendant to answer the plaintiff's own ca In this respect, too, we alter the judgm of the Principal Sudder Ameen, and t costs of suit of Soometra Debee will defrayed by the plaintiff.

d

The 18th July 1865.

Present :

n'ble C. Steer and E. Jackson,

Judges.

n—Suit for profits alleging dispossession.

Case No. 954 of 1864.

Appeal from a decision passed by udge of Midnapore, dated the 27th ry 1864, modifying a decision passhe Principal Sudder Ameen of that ct, dated the 26th September 1863.

e Dayee and others (Defendants), *Appellants,*

versus

dhoo Soodun Mytee (Plaintiff),

Respondent.

ungshee Doss Seal for Appellants.

Hem Chunder Banerjee and *oocool Chunder Mookerjee* for Respondent.

ff can sue for the profits of property from has been dispossessed by the defendant, ing obliged to sue for possession. The rescribed by Clause 12, Section 1, Act XIV. applicable to such a suit.

ave admitted an application for a our judgment in this case.

orm in which this suit was brought correctly stated to us at the former It appears not to have been a suit r the principal and interest lent on eshgee lease for eight years, but a ging a dispossession by the lessor, ming the profits which, under the uld have come into the hands of the om the years 1264 to 1270, and an l amount of profits for the years t 1272, which still had to run. The efore, is not so much founded on a f contract, but is more in the shape for the specific performance of that not by obtaining possession of the leased, but by obtaining the profits roperty. To such a suit, Clause 10, t, Act XIV. of 1859, does not apply, ordinary Law of Limitation, Clause on 1, Act XIV. of 1859. The plaintefore, within time, and, setting aside er judgment, we confirm the orders y the Lower Court, holding that the ot barred by the Law of Limitation, on very different grounds from which the Lower Court came to the nclusion.

We now proceed to try the remaining points urged on this appeal.

It is said that the action will not lie as brought; that the plaintiff was bound to sue for possession, and could not sue for the profits only. But no sufficient reasons are given for this view. The defendant is collecting rents, which properly belong to the plaintiff whom he has dispossessed. The plaintiff is entitled to those rents, and the defendant must restore them to the rightful owner.

It is then said that the Lower Court has not correctly found that the plaintiff has been dispossessed by the defendant—a fact which was denied by the defendant. There is, however, a clear finding upon the point on the evidence, and the Judge says he sees no reason for differing from the opinion formed by the Principal Sudder Ameen.

We see, then, no sufficient ground for interference in the Lower Court's decision, and dismiss this appeal with all costs.

The 20th July 1865.

Present :

The Hon'ble G. Loch and F. A. Glover,

Judges.

Transfer of suit—Omission of Judge to give reasons for—Procedure as to amendment of issues, &c.—Issue of commission to examine absent Witnesses—Notice to opposite party—Interest on interest of Government Promissory Notes.

Case No. 90 of 1865.

Regular Appeal from a decision passed by the Judge of Hooghly, dated the 29th December 1864.

Tarucknath Mookerjee and others (Defendants), *Appellants,*

versus

Gouree Churn Mookerjee (Plaintiff), *Respondent.*

Mr. J. Read and *Baboos Dwarkanath Mitter* and *Sham Lal Mitter* for Appellants.

Messrs. W. A. Montriou and *G. C. Paul* and *Baboo Romanath Bose* for Respondent.

Suit laid at rupees 21,971-6 as. 2 pie.

The mere transfer of a suit, for the convenience of the public, or for the acceleration of business, from one Subordinate Court

to another, does not affect the authority of the Judge of the District Court to transfer it to his own file or to another Court, or to re-transfer it, if he see sufficient cause for so doing. Nor would the circumstance that a case had been up in appeal to the High Court on a preliminary point, and been remanded for a trial on the merits, limit the authority of the District Court to bring it on to his own file, or to transfer it to the file of a Court other than that in which it was instituted. The omission of the Judge to assign his reasons for transferring the case does not vitiate his proceeding.

When a Judge transfers a case to his own file, he is at liberty to amend the issues first laid down, and to prove additional issues, and to go into the whole case, except upon any question upon which there has been a judicial finding.

The issue of a commission for the examination of an absent witness, without notice to the opposite party, even if not illegal, is objectionable.

Interest may be claimed on the interest of Government Promissory Notes withheld by another.

THE admitted facts of this case are as follow: Ram Narain Mookerjee (now represented by the appellants), the uncle of the plaintiff, had made over to his charge six Government Promissory Notes for Sicca rupees 1,23,600, the property of the plaintiff and his two brothers. Ram Narain had them renewed in his own name, and drew the interest thereon, amounting to rupees 29,926-6-9, which he divided among the three brothers on the 22nd Bysack 1254 (4th May 1847). On 2nd August 1851, plaintiff received from Ram Narain two Government Promissory Notes for Sicca rupees 35,000; on 11th October 1852, rupees 2,000 in cash; and on 17th October 1853 a further sum of rupees 1,000 in cash. On the 2nd June 1853, plaintiff received rupees 2,000 in Government Promissory Notes, which, however, he alleges, were on a different account; and, lastly, the Court find that he received a further sum of rupees 3,750 through his Attorney, Mr. Hedger, on 22nd February 1851, a fact admitted by his Counsel, as the sum is entered in the late Mr. Hedger's books.

Plaintiff brings his action to recover rupees 6,200, the balance of the Government Promissory Notes due on his third share of the sum of rupees 1,23,600, interest on the whole of his third from May 1847, the last date of payment of interest to 2nd August 1851, when he received the two Notes for rupees 35,000, and then interest on the balance up to date of suit, deducting subsequent payments, and interest on the interest of the Government Promissory Notes as such interest became due, and which Ram Narain failed to pay to the plaintiff, making a total of rupees 30,181-7-8½.

In his plaint Gouree Churn sets forth that six Government Promissory Notes for rupees 1,23,600 were deposited with Ram Narain; that, on 24th April 1847, plaintiff served him with a notice through his A ney, Mr. Hedger, calling upon him to de plaintiff's third share to him, or he w render himself liable for any loss of int that might occur; that accordingly *(tuda share)* the defendant executed an agree on the 20th June 1850 for his share o Promissory Notes, amounting to ru 41,200; that, deducting payments, a bal of rupees 30,181-7-2 remained due to which, notwithstanding the plaintiff's quent demands, Ram Narain had faile pay.

In his written statement, the defen Ram Narain admits having charge of Government Promissory Notes, but pl that, after payments made, there remai balance of rupees 1,878-4-1 only du plaintiff. He says that he had paid amount deposited with him by the pl iff, and that the amount due by hin the three brothers was shewn in acco bearing their signatures; that plaintiff his brothers having, on 20th June 1850, manded the Promissory Notes and inte he executed a receipt promising to pa each of them his share on 15 days' no being given; that plaintiff cannot dem interest upon interest, and that the clain interest is opposed to the provisions of XXXII. of 1839. The defendant d having received the notice of 24th 1847, and points to that filed by pl as being the original, and that consequ it could not have been served, or it w not be in plaintiff's hands; and the def ant declares that the plaintiff's state of having made repeated demands is true, and that the present action has got up, because the defendant was oblig bring an action against plaintiff for ar of Government revenue paid on his acc

The only part of the plaintiff's w statement (which has apparently been p very irregularly) that we need refer t present is the 3rd para., in which he i on his right to interest on the interest o Government Promissory Notes with from him by the defendant, and he this cannot be called compound interest, does not come under Act XXXII. of 18

Before disposing of the merits of case, we must clear away a cloud of ob tions raised by the Counsel for the appe regarding the pleadings and regarding proceedings of the Lower Court. With gard to the plaint, it is urged that the c of action is not properly stated, and plaintiff is incorrect in his allegation

the agreement of 20th June 1850 was given in conformity with the notice of 24th April 1847. The Counsel points out an error in the translation of the words "*tudanooshare*," which he thinks likely to mislead the Court. Admitting that the proper translation of the words is as insisted upon by the Counsel, we think we may dismiss all further reference to the said notice of 24th April 1847, for it appears to us that, whether served or not upon the defendant, it had reference to quite a different matter, *viz.*, the realization and distribution of interest then due on the Government Promissory Notes in Ram Chain's hands, amounting to more than 6000 rupees, which he realized and paid to plaintiff and his brothers in the May following, and is wholly unconnected with this case.

The learned Counsel then contended that, under the terms of the receipt given by defendant, he was entitled to 15 days' notice before paying the money deposited with him; that no such notice had been served upon him, and, till that were done, the plaintiff was not in a position to bring an action against him for the amount claimed, for the cause of action would be that defendant failed to pay after notice served, but here no notice had been given.

We think this objection untenable, for, whether there had been notice or no notice, we find that the defendant had been refunding to plaintiff the sums due to him. Defendant alleges that he has paid all but 1,878 rupees. The plaintiff says, "6,200 rupees of principal is still due, beside all the interest which you have not accounted for from 1847; and the interest thereon, which I might have realized had that interest been duly paid." We think that a suit can be brought to realize the balance thus said to be due without a previous notice to pay in 15 days.

We may now notice briefly the objections taken to the proceedings of the Judge. It is said that, under orders of the High Court, dated 23rd March 1863, this suit was on the 25th idem ordered to be transferred from the file of the Principal Sudder Ameen, in whose Court it had been instituted, to the file of another Principal Sudder Ameen; that, *secondly*, the case had been up in appeal to the High Court, and had been remanded, and consequently that the Judge had no authority to deal with this case under Section 6, Act VIII. of 1859, for it was no longer in the Court in which it was instituted, but was a transferred case and a remanded case, and, as laid down by Lord Brougham in Vol. VI., Moore's Indian Appeals, p. 155, the words of the law must be read literally and in their common meaning; *thirdly*, that the Judge, merely on the petition of Gouree Churn, who was dissatisfied with the Principal Sudder Ameen for refusing to comply with his request for postponement of the case, transferred the case to his own file without assigning any sufficient reason for so doing; that the Court of the Principal Sudder Ameen is one of concurrent jurisdiction with that of the Judge, and, therefore, the Judge had no authority to set aside the issues fixed by the Principal Sudder Ameen, or to pass orders opposed to those passed by the Principal Sudder Ameen, for in so doing he acted as a Court of Appeal; that he had decided a point which formed the fifth ground of appeal to this Court on a former occasion, but was withdrawn, and so the order of the Principal Sudder Ameen, regarding it was final; and, *lastly*, that the Judge, without giving the defendant intimation or an opportunity to put in a list of interrogatories, issued a commission to take the evidence of Wooma Churn Mahapatro, and admitted it, notwithstanding the objection taken by the defendant.

Without entering into the elaborate argument with which the learned Counsel sought to support these objections, it is enough for the Court to state that it dissents almost entirely from these objections. The Court hold that the mere transfer of a suit for the convenience of the public or for the acceleration of business from one subordinate Court to another does in no way affect the authority of the Judge of the District Court, either to transfer it to his own file or to another Court, or to re-transfer it, if he see sufficient cause for so doing. Nor would the circumstance that a case had been up in appeal on a preliminary point, and been remanded for a trial on the merits, limit the authority of the District Court to bring it on to its own file, or to transfer it to the file of a Court other than that in which it was instituted. As for the objection that the Judge has transferred the case without assigning any reason for so doing, we think it would have been more satisfactory if the Judge had given his reasons; but his omission to do so does not in any manner vitiate his proceedings. He doubtless saw what he considered sufficient cause to warrant the transfer, but has failed to record his reasons. The omission, however, cannot affect the legality of his judgment in the case.

We think also that the learned Counsel is wrong in taking exception to the Judge's proceedings when the case was brought on to his file. It was open to the Judge to record new issues, and to call for further evidence as if the case had been originally instituted before him, and he was at liberty to go into the whole case except upon any question upon which there had been a judicial finding. Section 141 of Act VIII. of 1859 distinctly declares the power of a Court to amend the issues first laid down, and to frame additional issues; and, therefore, when the case came before the Judge for trial on the merits, he was at liberty, we think, to set aside such as he thought irrelevant, and to frame new ones. With regard to the commission issued for the examination of an absent witness, we think that, even if the wording of the law admit of a commission being issued without notice to be opposite party, it is objectionable to do so. Each party should have the opportunity of examining the absent witness by interrogatories. In the present case, however, as nothing turns upon the evidence of this witness, we think it unnecessary to take further notice of the objection.

We come now to the merits of the case. We concur with the Judge in considering it to be proved that the following sums were paid, *viz.*:—

Rupees 3,750 on the 22nd July 1851, cash.

Rupees 35,000 on the 2nd August 1851, two Government Promissory Notes.

Rupees 2,000 on the 11th October 1852, cash.

Rupees 2,000 on the 2nd June 1853, Government Promissory Notes.

Rupees 1,000 on the 17th October 1853, cash.

To prove payment of other sums, certain books of account kept in the defendant's office have been produced, and their correctness has been sworn to by certain witnesses, Ram Chunder and Banee Madhub, in the employment of the defendant, and Kenaram, the brother-in-law, and at one time the naib of the plaintiff, with whom it is urged there exists a strong feud in consequence of certain suits instituted by plaintiff's sister against plaintiff to recover certain properties claimed by her. No receipts from the plaintiff have been produced in support of the payments entered in these accounts, and it is acknowledged that none were ever taken. Is is urged, however, that, if there were reasonable grounds for questioning the correctness of the entries made in the defendan books, the plaintiff, who also has accoun might have produced his, but that he been afraid to do so, and has trumped u silly story that Kenaram had made a with his books, a story which the Judge believed; that, if this were the case, pl iff would not have been able to give dates on which he received the partic sums which he admits that he has receiv and that the correct dates could not have b given after the lapse of so long a period with a reference to some accounts. The quest however, is not what plaintiff might be a to show, but whether the defendant proved his case, for the burden is on h Even supposing that these books are of character admissible as corroborative dence under Act II. of 1855, and it be pro that they have been regularly kept, yet evidence goes merely to prove the credi lity of the books as genuine accounts com from, and duly prepared in, the office of defendant; but the correctness of each it of payment is not proven thereby; this m be done by the receipts of the pa receiving the money, or by other suffic evidence; a general statement by the vants of the defendant, that they usually present when the payments made, is altogether insufficient for this pose. On the evidence of Ram Ch upon this point, the Judge remarks that witness also states that some of these ments were made on letters presented plaintiff's servant, but none of these let are produced." And the Counsel for appellant has gone somewhat out of his to find fault with the Judge for makin statement not supported by the evidence the record, pointing out that the witness nothing about plaintiff's letters, but letter ceived from the defendant's house at Joon The Judge, however, says nothing of pla iff's *letters*, but that letters were brought *plaintiff's servants* indicating that these orders given by defendant for the payme of money to the plaintiff, and brought plaintiff's servants to the defendant's off and inferring that, if the money were paid them, it is scarcely to be supposed that defendant's servants would allow them take it without receiving some kind receipt form them, either on the back of letter or on a separate piece of paper. T witness, however, said, "When the Babo remained at Joonaye, the order of payme is sent under letter, and when they remain Calcutta, they call the cashier and order h

to pay the money." Though there has been a little inaccuracy in quoting this part of the evidence, it would have been quite sufficient to have pointed it out without charging the Judge with wilful inaccuracy. Plaintiff also says in his written statement that, with regard to the cash paid to him on 11th October 1852 and 17th October 1853, the defendant took separate receipts, and these are the only cash payments he admits. We think, therefore, that there is no sufficient proof of the payments alleged by the defendant to have been made by him other than the payments enumerated above.

With regard to the interest claimed, it is said for the appellant that plaintiff came into Court upon a contract; that on 25th August 1863, he presented a petition recitating his former claim, and stating that, if Ramnarain had misused his Government paper, he was entitled to recover them with 6 per cent. interest. He abandoned his former case, and took up this new case, and at the trial both were abandoned by the counsel, and the Judge has found a third case for him. The Judge holds that, as the interest on the Government Promissory Notes was payable on a date certain, and would, if paid to plaintiff, become part of his capital bearing interest, therefore plaintiff is entitled under the provisions of Act XXXII. of 1839 to interest thereon. Now, it is asked, could the Judge give interest under an Act which plaintiff himself declares has nothing to do with the question? Can it be said that the Judge has exercised a sound discretion in giving interest, for, though the day for the payment of interest on Government is fixed and certain, yet after the receipt given by defendant to plaintiff, interest was not payable to him till after 15 days' notice?

There appears to us a fallacy in this argument in regard to the notice upon which so much stress has been laid by the appellant. The circumstances of this case are such as to render unnecessary the service of such a notice as is contemplated in the acknowledgment of the 20th June 1850; and we may here explain what we understand to be the meaning of this paper. It is an acknowledgment by Ram Narain that he held possession of the Government Promissory Notes belonging to plaintiff and his brothers, and promises to pay the principal with any interest which might then be due on receiving 15 days' notice. It does not, in any way, release defendant from his obligation to pay the interest when realized, nor oblige the plaintiff, whenever he required his share of the interest, to give the defendant 15 days' notice. It refers to a final distribution of principal with any interest then due, and not to periodical payments of interest. The parties for some reason or other had commenced adjusting their accounts, and defendant had paid over large sums to plaintiff on which interest was legally due, and which defendant had drawn. He was surely bound to give account for the interest on the Government Promissory Notes, as well as of the principal; and, failing to do so, it does not require plaintiff to serve a notice upon him. Had no payments been made by defendant, and the plaintiff had wanted his money, it might, after the communication of June 1850, have been advisable, if not necessary, to give notice before bringing his action. But when defendant made over the Government Notes, or their equivalent to the plaintiff, he was, at the same time, bound to account for the interest which he had received on plaintiff's account; and if he had received interest for the plaintiff, and retained it for his own purposes, there is nothing unreasonable in the claim, now made by plaintiff, for interest on the interest derived from the Government papers, which, if paid to plaintiff as it became due, and was realized, might have been invested by him in some way which would have yielded him interest.

In disposing of this case, we do not think that the action of the Court is restricted by any of the technicalities so strongly pressed by the appellant. The whole appeal has, we may say, been a continuous string of technical objections, which we take the liberty to break, and shall endeavour to do justice between the parties, whether plaintiff has stuck to his first statement, as given in the plaint, or has, for some reason best known to himself, attempted to raise any other cause of action by subsequent petition. Now, looking to the position of the parties, and the duty imposed upon Ram Narain as trustee for the plaintiff and his brothers, we have no doubt that, as the interest on the Government Promissory Notes became due, it should have been realized and distributed. Plaintiff might have made a profitable investment of the interest if it had been regularly paid to him; and because the defendant failed to pay the interest regularly, which he was legally bound to do, we fail to see why plaintiff should not be entitled to interest upon that certain interest irrespective of any demand he might make, or of any thing contained in Act XXXII.

of 1839. We concur, therefore, with the Judge in considering that the claim of the plaintiff is good against the defendant. We do not, however, understand why the Judge has allowed quarterly interests. Interest on Government Promissory Notes is generally payable half-yearly; and it has not been shown us that the interest on these Notes was payable otherwise than half-yearly. We therefore direct an account to be prepared in this Office, showing the amount due to plaintiff with half-yearly, instead of quarterly, interests; and the sum so found will be recoverable by him from the defendant, with interest from date of suit and costs in proportion, and with interest on the whole sum from date of suit till date of liquidation.

The order in appeal No. 91, between the same parties, which depends on the decision come to by the Court in this case, is confirmed, and that appeal dismissed with costs.

The 20th July 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Religious Endowment—Joint Hindoo Family—Transfer of right of worship.

Case No. 914 of 1865.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 10th January 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 4th June 1864.

Ukoor Doss (Defendant), *Appellant,*

versus

Chunder Sekhur Doss and others (Plaintiffs), *Respondents.*

Baboos Tarucknath Sein and *Onoocool Chunder Mookerjee* for Appellant.

Baboo Dwarkanath Mitter for Respondents.

The right of worship of an idol, being the joint property of the members of the family of the endower, cannot be transferred to a third party, a stranger to the family, so as to inure beyond the life of the assignor.

THIS is a suit to cancel a deed of assignment, whereby certain endowed lands and rights of worship were made over to the defendant, the special appellant.

The lands were endowed for the worship of the idol *Koonjo Beharee Thakoor*, &c. The rotation of worship was enjoyed by the different members of the family of the endower; the said family being a joint Hindoo family. Subsequently, disputes arose, and one of the members of the family, or Juggurnath Doss, was compelled to resort to a suit for the restoration of his turn of worship and other privileges under the term of the deed of endowment. He obtained a decree, confirming his rights, on the 15th May 1849; and, on the 12th November 1853, made over his rights, without consideration, to the defendant, who is a Brahmin, and against whom no objection can be raised on the score of caste or incompetency to carry on the purposes of the endowment. The present suit is brought to set aside this deed of assignment as invalid and illegal.

The Judge holds that the deed of assignment amounts to a perpetual alienation of the right of the assignor, and that such alienation is illegal. The suit of the plaintiff was decreed.

In special appeal, it is contended that the assignment is not illegal, inasmuch as the purposes for which the endowment was originally made are secured by such arrangement, by the terms of which the right of management of the endowed lands and turn of worship of the idol alone pass.

We are of opinion that the idol being the joint property of the members of the family of the endower, they alone are entitled to their turn of worship, and to manage the affairs of the endowment. It is the essence of a family endowment amongst Hindoos, that no stranger shall be permitted to intrude himself into the management of the endowment. On the death of Juggurnath, without heirs, his right to a turn of worship and other privileges devolved to the other surviving members of the joint family. The deed assigning the rights of Juggurnath might be said to be valid during his lifetime, inasmuch as Juggurnath undoubtedly possessed a right of worship personally, or by fitting proxy; but such right could not be transferred to a third party, a stranger to the family, so as to inure beyond the life of Juggurnath.

We confirm the decision of the Lower Court, and dismiss this appeal with costs, payable by the special appellant.

The 20th July 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Presumption—Exclusive possession of purchased property by one brother and his heirs.

Case No. 902 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Nuddea, dated the 31st December 1864, affirming a decision passed by the Moonsiff of that District, dated the 27th May 1864.

Kishen Chunder Mowleek and others (Defendants), *Appellants,*

versus

Huro Chunder Chatterjee (Plaintiff) and others (Defendants), *Respondents.*

Baboos Baneenath Bose and *Bhuggobutty Churn Ghose* for Appellants.

Baboos Kalee Mohun Doss and *Uprokash Chunder Mookerjee* for Respondents.

When one of two brothers (who were once joint) and heirs have been in exclusive possession and enjoyment of a purchased property for a long time, the presumption is that the purchase was made by that brother, and that the other brother had no right, title, or interest in it.

The subject of dispute in this case is the right to a very small bit of land; and the main and material fact on which the decision of the case rests is whether the land was acquired by Kishen Chunder as his own individual purchase, or whether, at the time it was so acquired by Kishen Chunder, he and his brother Gokool were living together as a joint undivided Hindoo family, and the purchase of Kishen Chunder must be considered as a joint purchase by him and his brother Gokool.

The property was allowedly bought upwards of 50 years ago. It is difficult, therefore, after the lapse of so long a time, for the heirs of Kishen Chunder to adduce evidence that the brothers Kishen Chunder and Gokool, who, without doubt, lived in the same village of Chagurrea at the time, were not a joint undivided family. Whether the Principal Sudder Ameen means to find that they were a joint family is not certain from his judgment; but he has found, from the evidence of a separate possession of 50 years, by the heirs of Kishen Chunder, that the presumption is that the property belonged solely to Kishen Chunder, and that the plaintiffs, his heirs, are entitled to it. There is nothing, as the special appellant urges, which is inconsistent in this finding with anything advanced by the plaintiff. His statement has, all along, been that Kishen Chunder alone and for himself bought this land, and the way that the Principal Sudder Ameen has arrived at the same conclusion is quite warranted. There may have been a joint *status* at some time or another; but when we see one brother in the exclusive possession of a purchased property, and when we see his heirs and his heirs alone in possession for a century, we may safely conclude that the purchase was made by the party who has had exclusive use and enjoyment of the property, and that the other brother had no right, title, or interest in it.

It is further objected that the Principal Sudder Ameen had no right to find that the deed of sale by Soobul, one of the descendants of Kishen Chunder, in favor of Huro Mohun, is not genuine, as there was no appeal to him on that point, when he remanded the case for re-trial. We find, however, that the original appeal-petition did object to the whole judgment of the Moonsiff, and, therefore, the Principal Sudder Ameen was warranted in holding, after the case came back from the Moonsiff, that Soobul's sale was not genuine.

A third objection is that the Principal Sudder Ameen has not given any reasons for holding that a certain pottah alleged to have been given by a female to one of the defendants, and on which the defendant claims to hold the land thus leased, is collusive and false; but the first Court found it so, and the Principal Sudder Ameen, though he gives no reasons of his own, may be supposed to have decided the question in the way he did in reliance on the grounds and reasons set forth in the judgment of the Lower Court which he upheld.

There being no tenable grounds for the special appeal, we dismiss it with costs.

The 21st July 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Appeal—Arbitration without intervention of Court—Enforcement of award.

Case No. 174 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 9th December 1864, reversing a decision passed by the Sudder Ameen of that District, dated the 28th June 1864.

Anund Chunder Singh (Plaintiff), *Appellant,*

versus

Gopal Chunder Dan (Defendant), *Respondent.*

Baboo Mohendurnath Mitter for Appellant.

Baboo Anund Chunder Ghosal for Respondent.

An appeal lies from the order of a Court directing the enforcement of an award of arbitrators when the matter was referred to arbitration without the intervention of a Court.

THE suit, it is alleged, was to enforce a private award; and it is urged on special appeal that there could be no appeal from the order of the first Court directing its enforcement as provided by Section 325. Even if this suit were of the nature it is stated to be, the Section of Act VIII. of 1859, quoted above, would not bar an appeal; it having been held by this Court that Section 325 is not applicable to awards sought to be enforced under Section 327, and that an appeal will lie. The Principal Sudder Ameen, in deciding the appeal, has held that the arbitration was altogether collusive, and has given a decree for the defendant reversing the order of the first Court. With regard to the other points taken in special appeal, we do not think that they affect the legality of the decision passed by the Lower Appellate Court. We reject the appeal with costs.

The 21st July 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Sale by Mother—Legal necessity—Non-recital of, in deed—Proof of.

Case No. 978 of 1865.

Special Appeal from a decision passed by the Second Principal Sudder Ameen of Hooghly, dated the 14th January 1865, reversing a decision passed by the Moonsiff of that District, dated the 16th April 1864.

Womesh Chunder Sircar (Plaintiff), *Appellant,*

versus

Digumburee Dossee and others (Defendants), *Respondents.*

Baboo Mohendur Lal Shome for Appellant.

Baboo Hem Chunder Banerjee for Respondents.

The mere non-recital in a deed of sale by a mother during her son's minority of the legal necessity for the sale does not vitiate the deed. The necessity may be proved by other evidence.

THIS was a suit to recover land sold by the plaintiff's mother during plaintiff's minority, on the allegation that there was no legal necessity for the sale.

The Principal Sudder Ameen, on appeal, differed from the first Court, and held that the evidence proved that the sale was made for the plaintiff's support.

Baboo Mohendro Lal Shome, on special appeal, contends that, as this fact was not recited in the deed of sale, the deed cannot be supported.

Such sale will be confirmed on proof of legal necessity for the sale. It matters not how that necessity is proved. The recital of it in the deed would be one species of evidence. That evidence is wanting in this case; but other sufficient evidence is adduced to prove the facts in the opinion of the Principal Sudder Ameen.

There are no sufficient grounds in this case for any special appeal. We dismiss this appeal with costs.

The 25th July 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Jurisdiction (of Civil Court)—Suit for ascertainment and demarcation of a Shikmee Talook, and for assessment of rent thereon.

Case No. 112 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Tipperah, dated the 5th January 1865.

Jugut Tara Chowdhrain and others (Defendants), *Appellants,*

versus

Rajah Protap Chunder Singh and others (Plaintiffs), *Respondents.*

Baboo Onoocool Chunder Mookerjee, Chunder Madhub Ghose, and *Romesh Chunder Mitter* for Appellants.

Mr. R. V. Doyne and *R. T. Allan* and *Baboos Kishen Kishore Ghose* and *Dwarkanath Mitter* for Respondents.

A suit for the ascertainment and demarcation of a Shikmee Talook is cognizable by the Civil Court, notwithstanding that it includes a claim for the assessment of rent thereon.

This was a suit by the respondents (plaintiffs in the Court below) for the ascertainment and demarcation of the lands of a certain Shikmee Talook, named Goorchand Goorchore, held by the appellants as tenants, and for the assessment of rent thereon (after notice under Regulation V. of 1812). The plaint included a prayer for the ascertainment and demarcation of a Kharija Talook of the same name in possession of the appellants, and held by them direct from the Collector, on the ground that the lands of the Shikmee Talook of which the appellants are simple tenants had been intentionally mixed up by them with the lands of the Kharija Talook, and that, to ascertain the amount of land belonging to the one, the demarcation of the other was necessary.

We may remark here that the respondents are auction-purchasers of some 30 years' standing, and that, up to the date of the present suit, no attempt has been made to define the extent of their Shikmee Talook.

The appellants reply, *first*, that this, being a suit for recovery of arrears of rent as between landlord and tenant, ought to have been instituted under Act X. of 1859 before the Collector, and that the Civil Court has no jurisdiction.

Secondly, that they hold the Shikmee Talook, which consists of 14 drones 5 kanees land only at a yearly rent of 501 rupees under a dowl dated in the year 1187, given by the former owners of the zemindaree, and not the dowl of 1244, under which the respondents claim, and which gives the zemindar power to measure the Shikmee Talook and demand rent for any lands found in excess of the 14 drones 5 kanees, is worthless, having been executed when the appellants were minors, by parties whose acts were not binding on them.

Thirdly, that the respondents have never measured any lands in possession of the appellants as "Shikmee," and that their allegation that 254 drones have been found as belonging to the Shikmee Talook in the ten Mouzahs mentioned is false, these Mouzahs appertaining wholly and solely to the Kharija Talook.

And, *lastly*, that the Shikmee Talook contains 14 drones 5 kanees only, for which appellants have always paid a fixed rent of 501 rupees.

With regard to the question of jurisdiction we think that the action of the Civil Court was not barred. The suit has, no doubt, been brought in an unusual and clumsy form. The plaintiff should have first sued for the ascertainment and demarcation of his Shikmee Talook, and then have sued in the Collector's Court for rent on it. But since the suit as brought contains matters, such as the ascertainment and demarcation of the lands, on which a Revenue Court could not adjudicate, it was, in accordance with several rulings of this Court, cognizable by the Civil Court, the question of rent notwithstanding.

Taking this view of the case, it is unnecessary for us to go into the question, whether service of notice under Regulation V. of 1812 would take the case from under the cognizance of Act X. of 1859.

On the merits, the Principal Sudder Ameen gave the plaintiffs a decree for 31 drones 15-10-6-5 over and above the 14 drones 5 kanees admitted by the defendants to be in their possession as the Shikmee Talook, and assessed them at an annual jumma of rupees 1,193-9-2 in accordance with the rate mentioned in the dowl. He gave likewise mesne-profits to the extent of rupees 4,774-4-8.

With regard to the plaintiff's application for the ascertainment and demarcation of the respective lands of the Shikmee and Kharija Talooks, he passed no order.

It is urged in appeal that the Principal Sudder Ameen has decided the case in favor of the zemindars without requiring them to give any proof of their assertions; that the respondents utterly failed to point out the lands said to belong to the Shikmee Talook, or even to detail the villages in which the lands were to be found. They offered no proof, moreover, as to the quantity of the lands claimed as Shikmee, but laid their suit at 254 drones by guess, as is proved by the fact that the Principal Sudder Ameen has only awarded them in all 46 drones odd, or 31 drones odd in excess of what appellants admitted themselves to be in possession of; that the Ameen conducted his enquiry improperly, and measured the lands with a smaller rod than the customary one for measuring talooka lands; and, *lastly*, that the Principal Sudder Ameen has given a decree impossible of execution and directly contrary to the plaint. He has ordered 31

drones 15-10-10-15 of land to be assessed without determining where those lands are, in what villages or kismuts: he has not demarcated the talooks, nor decided what lands belong to each.

It is contended by the other side that the Principal Sudder Ameen has done all that was under the circumstances possible; that, during the time that had elapsed since the first settlement, the boundaries of the different lands had become hopelessly confused; and that it was impossible for the plaintiffs to show where they were, or to specify particularly the lands they claimed; that the Principal Sudder Ameen, in referring to the admission made by the appellant's predecessors in the Civil Court of Jehangeernuggur, as to the extent of the Kharija Talook, took the only course open to him, and, as all the land not belonging to the Kharija must necessarily be part of the Shikmee Talook, he was right in decreeing the difference to the plaintiffs.

With regard to the standard of measurement, it was contended that the weight of evidence was in favor of the shorter "*null*" of 16 cubits.

After a lengthened hearing of the arguments adduced on either side, we do not see any reason why the ordinary rule of law, which imposes on plaintiffs the burthen of proving their own case, should be set aside.

It is true, as urged by Mr. Doyne, the respondents' Counsel, that the appellants are auction-purchasers, and, as such, would be, under ordinary circumstances, very much in the dark as to what their actual rights were; and that, as the appellants have held the Shikmee tenure for the best part of a century, during which time they have had every opportunity of confusing the boundaries, it would be very difficult for the respondents to show what lands were Shikmee and what Kharija. But it must not be forgotten that, in the present instance, the appellants have held as auction-purchasers for upwards of 30 years, and have had, therefore, every opportunity of making enquiries, and of ascertaining their rights; and they have been unable to point out one single drone of land other than those admitted by the appellants as belonging to the Shikmee Talook. They have not been able even to specify the quantity of Shikmee land in any one mouzah. In short, had they come into Court with their general allegation, and had the appellants produced no documents at all, but contented themselves with a simple denial of the respondents' allegations, the case of the latter must have been dismissed fro an utter failure of proof in support of a one of their statements. But the appella have pointed out the 14 drones 5 kane which they say constitute the Shikm tenure, and as the dowl, on the strength which the respondents sue, the dowl 1244 that is, mentions that amount of la only, it is, we think, clearly on the respo ents to show that the appellants held la in excess, and to point out where those la are. They were bound at least to make a *primâ facie* case, but they have done thing at all.

The Principal Sudder Ameen admits t the respondents have not been able to pr that the appellants hold more Shikmee la than those mentioned in the dowl; but p ceeding on the admission of the appellan predecessors before the Civil Court of Jeha geernuggur in 1782, and holding, on th strength of the appellants not claiming unde any other title, that all the lands in the possession must be either Kharija or Shik mee, has deducted the 363 drones mentione in that admission from the quantity of la found by the Ameen to be in the appellan possession, and has decided the difference be Shikmee land. Supposing, for the s of argument, this method of adjudicatio be, under the circumstances, a proper the amount of land in appellants' posse reckoned in drones, would still be depe on the length of the measuring rod. Principal Sudder Ameen has decided the shorter *null*, *viz.*, that of 16 cubits of inches to the cubit, is the one in general u but we think that the documentary evide adduced by the appellants, notably the p wannah of 1776, and the parwannah of 11 B. S. (1775 A. D.), together with the p ceedings of the Commissioner, Mr. Ke dated 1837, which mentions the perwann go far to show that for talooka lands larger or *sekunduree* measurement rod employed. It has been shown to us on e dence, which is not disputed, that oth talooks in the same *modufa* were so measur And, if this be so, the Ameen's proceedin go for nothing, and are no proof whatever the amount of land now in the appellan possession.

We have noticed the question, as it w argued at some length by both sides, but o decision, reversing the Principal Sudd Ameen's decree, and dismissing the plaintif suit with costs, proceeds on the broad groun that he altogether failed to prove any o part of his plaint.

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The 27th July 1865.

Present:

Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

ance of mortgaged property (by Mortgee with power to sell)—Rights of purser.

Case No. 120 of 1865.

lar Appeal from a decision passed by Mr. Abercrombie, Judge of Dacca, dated the th January 1865.

mas Robert Doucett (Plaintiff), *Appellant,*

versus

h Patrick Wise and others (Defendants), *Respondents.*

r. R. V. Doyne and *C. Gregory* for Appellant.

Mr. G. C. Paul and *Baboo Onoocool Chunder Mookerjee* for Respondents.

Appeal laid at rupees 50,000.

and Co., mortgagees with power to sell, sold the ged property to the defendants. No deed was d until some years afterwards when the mort- s dead. The deed was in the form followed tgagor is the vendor and the mortgagees join eyance; but the words of conveyance were by gees alone, and without any confirmation by gor. HELD that the purchaser did not, by , acquire an indefeasible estate.

think that the judgment of the Lower , on the plea of limitation, must be red, and the case remanded for trial; cause of action stated in the plaint g apparently accrued to the plaintiff appellant) within the period ordinarily red by law for a suit of this kind. No nce has yet been adduced on either , and we can, therefore, at present, do no than decide the issue of limitation, and the grounds of our decision.

he lands and the Indigo Factories in ute were mortgaged, in 1840, to the of Messrs. Bagshaw and Co., of utta, by Mr. Robert Doucett, the tiff's father. The defendant claims to the property by purchase from the tgagees in December 1846, and by a deed conveyance to him, which is produced, is dated the 20th February 1850. It dmitted that this deed, which purports to made by (among other persons) Mr. ert Doucett, was never executed by him, that his death occurred before the time its execution. The plaintiff contends , neither by this deed, nor by any of the ctions prior to it which took place between Bagshaw and Co. and the plaintiff's father, and the defendant Wise, has the property ever been completely transferred by purchase to the latter; and that he has acquired only a defeasible interest therein, subject to a right of redemption now vested in the plaintiff, as heir to his father, and which he seeks to enforce by this suit.

Messrs. Bagshaw and Co., being themselves only mortgagees, could, in that character alone, convey no larger or other interest to Wise, who bought from them, than their mortgage interest, unless they were duly empowered by Robert Doucett, the owner of the property. The mortgage-deed contained, it is admitted, a power of sale; and, if the deed of 1850 can have effect as a deed of sale made in execution of this power, it gives to the purchaser a complete title. If the deed operates, not as an execution of the power, but simply as a conveyance by the mortgagor and the mortgagees of their respective rights and estates, it cannot take effect as a conveyance of the equity of redemption, because it was never executed by Robert Doucett. The deed itself, so far as it is now necessary to state its contents, purports to be made between the partners of the firm of Bagshaw and Co., of the first and second parts, Robert Doucett of the third part, and Josiah Patrick Wise and George Deare Glass, of Dacca, of the fourth part. It recites the mortgage (without mentioning the power of sale), and also that Robert Doucett, with the consent of the mortgagees, had contracted with Wise and Glass for the absolute sale to them of the property, for a sum to be paid to the mortgagees in satisfaction of the mortgage-debt, and that the money had been long since paid, although no conveyance had been made in pursuance of the agreement. Then follow words of conveyance by the mortgagees alone ("at the request, and by the direction, of the said Robert Doucett, testified by his executing these presents") whereby the lands and factories, and also all balances and sums of money due by ryots and other persons to the factories, are conveyed to the purchasers. The mortgagees covenant that they have not charged or encumbered the property, and Doucett, the mortgagor, is made to enter into the usual covenants for title. This deed, which professes to be a conveyance in fulfilment of a previous contract or sale made by Doucett, with the consent of his mortgagees, is, in its commencement and conclusion, according to the form of words usually followed when

the mortgagor is the vendor, his mortgagees joining in the conveyance. But the words of conveyance are by the mortgagees alone, and without any words of confirmation by the mortgagor.

The only contract of sale which preceded this conveyance was one made in 1846 between Bagshaw and Co., the mortgagees, and Wise and Glass, which was communicated to Robert Doucett, and assented to by him in the terms of the following letters:—

"No. 1918.

"*To Mr. R. Doucett, Mymensingh, from Messrs. Bagshaw and Co., Calcutta, dated 26th December 1846.*

"DEAR SIR,—FOR some time past we have been in negotiation with Messrs. Wise and Glass for the sale of your factories at Dacca, and have just concluded the same upon the following terms, *viz.:* They agreeing to purchase the whole concern as it now stands (exclusive of the live stock already sold), for the sum of Company's rupees 12,500, payable in two instalments, by their acceptances at three and six months, we furnishing the same titles in all respects as we obtained and now hold them; Messrs. Wise and Glass taking over all the realisations and expectancies, and absolving, or holding harmless, both you and ourselves from all claims and liabilities. As there is not the least prospect of our doing better with these factories, we have deemed it advisable to accept the terms at once, and beg your confirmation of, and concurrence in, the same.

"*P. S.*—As we may probably deem it necessary to effect a further insurance on your life, we will thank you to fill up and return the enclosed forms by return of dâk, leaving the amount blank."

To the above letter, the following reply was returned:—

"*From Mr. R. Doucett, to Messrs. Bagshaw and Co., dated Mymensingh, 3rd February 1846.*

"DEAR SIRS,—I HAVE been duly favored with your letter of the 26th ultimo, apprising me of your having sold my factories to Messrs. Wise and Glass for 12,500 rupees, in two instalments, at three and six months; Messrs. Wise and Glass taking over all the realisations and expectancies, and absolving, or holding harmless, both me and yourselves from all claims and liabilities; to which, the bargain being completed, I can offer no objection. I am sorry I was not made aware of the pending negotiation, or of the terms on which you would have disposed of the factories; else, I suppose, a better price could have been obtained; but it is now of no use to say anything further on the subject.

"Being obliged to leave the station on business on Saturday last, the 31st ultimo, I now beg to return the forms which accompanied your letter, duly filled up, leaving the amount blank. Should you deem it advisable to effect a further insurance on my life, may I be allowed to hope that you will kindly add to the amount you may think necessary to insure ten thousand (10,000) rupees for the benefit of my family after my death; and, as the premium becomes annually reduced by a return payment at about 20 per cent., you can withhold these yearly returns.

"I am now advanced in age, and see, with sorrow, no chance of my being able to leave anything for my family—a circumstance very distressing to my feelings. Relying, therefore, upon your liberality, I entertain a confident hope that you will accede to my wishes, and comply with my request. I was once in affluent circumstances, but have unfortunately lost all in Indigo. I have toiled hard to retrieve my affairs, but the seasons have, for a series of years, been unfavorable, and hence alone my difficulties.

"I also solicit the favor of your giving me a release, now that the factories are sold and insurance effected on my life to cover all balances against me."

It is very probable that the contract thus announced and assented to was intended to be made by virtue of the power of sale which Messrs. Bagshaw and Co. had under the mortgage-deed. But we must look to the intentions of all parties, as they have expressed themselves in the written documents which are before us. In many important particulars, the deed, made more than three years afterwards, is not in substance or in form a fulfilment of the contract, which, in December 1846, Bagshaw and Co. told Doucett, by their letter, that they had concluded with Wise and Glass, whether the contract was made by virtue of the power or not. The deed, as we have said, contains no words of reference to the power; it recites a contract made by Doucett, and the mortgagees convey the property at the request, and by the direction, of Doucett, then given, and not under the power of a sale in their

deed. Moreover, they convey in terms as to give Messrs. Wise and the whole outstanding debts and assets, the old proprietor is left subject to all and liabilities, notwithstanding the of indemnity referred to in the last-ioned letter.

defendant, being a resident of Dacca, having purchased this property under rcumstances which have been stated, hich were within his knowledge, can-we think, contend that, by the deed, acquired an indefeasible estate. Full may, in due time, be given to the relied on in his behalf; but, for the se of deciding the only issue now before we are satisfied that the plaintiff's suit ot be held to be barred by limitation, that there is still a subsisting right in

e suit must be remanded to the Zillah for trial. We may add that this case rs to be one in which an application to Court may fitly be made under the 13th of the Charter.

The 28th July 1865.

Present:

on'ble H. V. Bayley and E. Jackson, *Judges.*

of Suit—Beneficial owners, or Trustees—Benameedars.

ler Appeals from a decision passed by Principal Sudder Ameen of Backerge, dated the 22nd December 1864.

Case No. 77 of 1865.

nno Coomar Roy Chowdhry (one of the Defendants), *Appellant,*

versus

roo Churn Sein (Plaintiff) and others (Defendants), *Respondents.*

boo Anund Chunder Ghossal for Appellant.

boo Nil Madhub Bose for Respondents.

Suit laid at rupees 5,711-15 annas.

Case No. 78 of 1865.

oroo Churn Sein (Plaintiff), *Appellant,*

versus

ojal Monee Chowdhrain and others (Defendants), *Respondents.*

R. V. Doyne and *Baboo Grija Sunker Mojoomdar* for Appellant.

Baboos Dwarkanath Mitter, Kalee Mohun Doss, Shib Chunder Mojoomdar, and *Nil Madhub Bose* for Respondents.

Suit laid at rupees 24,786-15 annas.

The real owner of property is the person who should institute a suit for it. A *benamee* holder may sue as trustee on behalf of the beneficial owner without disclosing the name of the real owner; and if the defendant does not object to the suit proceeding in that form, and raises no issue upon the real title of the plaintiff, the suit may proceed, and be decided.

THESE two cases, it is admitted by the pleaders of both parties, must be tried together.

No. 77 is simply an appeal upon the costs charged by the Lower Court against the defendant Prosunno Coomar Roy Chowdhry.

No. 78 is upon the general merits of the suit brought by plaintiff Gooroo Churn Sein.

Plaintiff Gooroo Churn Sein sues for a declaration of his own rights as superior landlord, by auction-purchase of a 9 gundas 1 cowree share of the zemindary in Pergunnah Selimabad, recorded in the Collector's rent-roll as No. 3848, and for the cancellation of the talookdaree rights asserted by the defendants as to certain kismuts of the estate.

Plaintiff's allegation of his own *status* is that he purchased the above estate at a public sale for arrears of Government revenue, held on the 22nd Aghrun 1265, *with his own funds and in his own name;* that he obtained possession of his purchase to some extent; but that the defendants, setting up a talookdaree title, resisted the plaintiff's taking possession of the lands now sued for, on the plea that plaintiff was not the real purchaser or owner.

The talookdars, defendants, answered that Prosunno Coomar Roy Chowdhry, a defendant in this case, was the real purchaser, and that plaintiff had no *status* in Court, as he was not in reality the purchaser or owner of the zemindary, which he alleged himself to be; and that this had already been so held in a decision under Act X. of 1859, which was upheld in appeal by this Court; that it was also so held in a case of execution of a decree against some of the talooks, in which case plaintiff had appeared unsuccessfully as a claimant. It is added that some of the talooks claimed do not even belong to the zemindary as alleged owner of which plaintiff sues; while other lands claimed by plaintiff as part of defendant's talooks do not belong to these defendants.

The defendant Prosunno Coomar Roy Chowdhry pleaded that he had no concern

whatever with the purchase of the zemindary, as purchaser and owner of which plaintiff sued.

The Lower Court, on these pleadings, and on the evidence, held that the plaintiff Gooroo Churn Sein was not the real purchaser; that he did not prove, by accounts or otherwise, that he did purchase the estate, or that he had the means to purchase it; that the evidence of sundry respectable persons, including amlahs of the Courts, proved that Gooroo Churn Sein was only a local agent of Prosunno Coomar Roy Chowdhry, and was the nominal purchaser only of the property; and that Prosunno Coomar was the actual purchaser.

The Lower Court also relied on this fact being proved in the case brought by the talookdars under Act X. of 1859, which decision was upheld in all the Appellate stages, and on the further fact that the summary decision was against plaintiff's claim in the execution case; lastly, that Section 246, Act VIII. of 1859, barred the suit. The Lower Court added that, although the decision under Act X. of 1859 above referred to related to 6 of the 13 kismuts which are the subject-matter of this suit, still that, as Prosunno Coomar Sein, who was then found to be the real owner of the zemindary on which plaintiff says the 13 kismuts lie, has not appeared or sued for them, Gooroo Churn cannot be permitted to sue for them; and that, if he did sue at all, it should be under Act X. of 1859, and not under Act VIII. as in this suit.

The Lower Court accordingly dismissed plaintiff's (Gooroo Churn Sein's) suit, and charged him and Prosunno Coomar (the latter as covertly acting through plaintiff) with all the costs.

Gooroo Churn appeals; and Mr. Doyne pleads the following points of law:—

1st.—That the Lower Court is wrong in relying on the decision in the case under Act X. of 1859, as that is no bar to plaintiff's suing in this regular suit, because it did not decide the validity of the defendant's alleged mokurruree title which plaintiff contests here.

2ndly.—That the plaintiff has the title to sue under the sale certificate of the Collector in his name, and, under the admission in plaintiff's favor of Prosunno Coomar, the only party who is alleged by defendant to have any title, and by the fact that the suit of plaintiff does not injure defendant or any one.

3rdly.—That the Lower Court should have gone into the validity or otherwise of defendant's talookdaree rights, which plai holding the proprietary title under his chase and sale certificate from the Court, every authority to question, and did que in this suit.

Baboo Grija Sunker Mojoomdar ap to plead for the appellant as to the and urges that the evidence relied on b Lower Court as showing that plaintif the *nominal* or *fictitious*, and Prosunno mar Roy Chowdhry, the *real* proprietor, not warrant such a conclusion.

Prosunno Coomar Roy Chowdhry ap in No. 77, on the ground that, as he h opposed plaintiff's claim, he should charged costs; and that, as other defen as well as this appellant, filed answers si to his, there is no reason why plaintiff this appellant only should be charged co defendants, or why the intervenors sh have full costs instead of in proportion to interests which they represented.

We have heard Mr. Doyne for the ap lant, and Baboo Dwarkanath Mitter for respondent, on the point of law, whet plaintiff's suit would proceed, and on the o points of law. We have also heard the o pleader for appellant, upon the *evidence* which the *fact* was found below, that Go Churn, plaintiff, did not really purchase, had no real *bonâ fide* interest whatever i property of which he alleged himself t the purchaser.

On the one side, the evidence for pl consisted of his sale certificate, and o admission of Prosunno Coomar that Go Churn was a *real* purchaser; and on other, the evidence of parties in a po to know who was the *real* purchaser, who depose that plaintiff was *not* such purchaser, but that Prosunno Coomar R Chowdhry was.

Now, we are clearly of opinion that, if evidence shows that the plaintiff, who cla the right to question in this suit the talo daree rights of defendants, because he chased the zemindary in which the talooks and is the zemindar who alone by law co question those rights, is *not* such purch nor such zemindar, his suit must be missed; because he sues on the allegation a title which he does not prove, and which must prove to entitle him to get a decree.

It is said that the plaintiff may sue benamee or a trustee for the real own and that, holding as he does the right a title in the estate under the certificate of Civil Court, any decision in the suit

is a party will bind the real owner. however, that, under the Law of re of this country, it is necessary e party who holds the real beneficiary t in the property should come forward intiff. A trustee may sue, but then esents the beneficiary interest of the *ui* trust, and would not, as plaintiff have put himself forward to the as himself the principal, or *cestuiqui* and *not* the trustee. A benamee- may sue as trustee in behalf of a cial owner without disclosing the name real owner; and if the defendant does ject to the suit proceeding in that form, ses no issue upon the real title of plaint- e suit might proceed and be decided, nameedar suing in the place of the real r. *But* if we think that the defendant ts to the suit being instituted by the no- l and fictitious owner, and denies plaint- tle to bring any suit at all, the suit cannot ed, or must be dismissed. There is no precedent upon the point, but we incline above view as consonant with equity and cy of the Civil Procedure Code. Al- Mr. Doyne urges that plaintiff can sue, no injury would accrue to defendant, e defendant could show that he incur- injury by a fictitious person coming as a plaintiff, the defendant would not ood ground for an objection as to the which might result to him. It was on ry well argued by Baboo Dwarkanath that a defendant may be injured at step of the trial by having a fictitious iff. The pleader referred to the fol- g instances: A verification of the by him is, in fact, no verification at all ow that the *real* owner has any good e of action; that further the sanction ch is obtained by verification to the truth e facts contained in the plaint, as vouch- r by the party who really is plaintiff, is ther lost. Again, a *real* owner, acting llusion, might plead that he was not a par- a suit when a fictitious owner in that very does, in fact, represent him. In execution s also, the man of substance might escape, the man of straw only remain, who would d no means of satisfying a just claim. n, the right to summon the plaintiff as ness, and the consequences of his non- dance, are all put an end to by the set- up of a fictitious plaintiff.

s, even if the benamee-holder was on an admission of the *benamee*, and a disclosure of the real owner, and with the consent of the real owner, recorded in the case, still we think that a defendant might have good grounds for objecting to the suit proceeding. Much more so when, as in this case, it is said that the benamee owner has falsely asserted himself to be the real owner. As the Lower Court has found that the plaintiff is *not* the proprietor of the estate as he alleges, and is, therefore, unable to question the right of the defendant, the first point which we have to decide is, whether the determination of the Lower Court on this point is correct or not?

Now, we have heard the whole evidence in the case, and unhesitatingly come to the conclusion that Gooroo Churn Sein is not the *real* zemindar, nor the *bonâ fide* purchaser.

Plaintiff is not shown to have been anything else but a servant of Prosunno Coomar Roy Chowdhry on a salary at most of 25 rupees a month. It is admitted that the purchase-money was 35,000 rupees. It is not shown that plaintiff had any other resources whatever, from which he might be able to make such a purchase for himself. It is shown that the party who paid the revenue was the mookhtear of Prosunno Coomar Roy Chowdhry. On this point, however, we are told that that person must be also considered to be the mookhtear of plaintiff, as he held the power for the vakalutnamah in this very case. We can only remark that this argument is as weak as the ordinary trick in such cases, which is to have resort to this shallow artifice in respect to giving mookhtearnamahs. Further, we see here no *real acts* of proprietorship or of possession sufficient to show the fact of plaintiff being really the owner. No evidence is adduced of the credits of the profits of this large zemindary to Gooroo Churn in his private or other accounts, or of their non-credit in those of Prosunno Coomar Roy Chowdhry.

Going, then, upon the broad facts found by us on the whole oral and documentary evidence, and looking to the conduct of Prosunno Coomar in the cases under Act IV. of 1840 and Act X. of 1859, we think that plaintiff fails altogether to show that he purchased the property which he alleges that he did, or that he is the zemindar which he alleges that he is, and on which allegations he sues.

As then we hold under the ple ngs in this case that, unless plaintiff be real

purchaser or owner, he cannot question the defendant's talookdaree title, and plaintiff is proved not to be such, we dismiss his suit with all costs of each defendant upon him in the first instance, except as to defendant Prosunno Coomar's own costs.

We further think the circumstances of the case justify an order that Prosunno Coomar pay all his own costs; but we do not think it necessary to go further at first. In case, however, each defendant cannot realize his own costs from Gooroo Churn, plaintiff, we think it right that each defendant should have a decree to realize his costs from defendant Prosunno Coomar Roy Chowdhry, and we decide appeal No. 77 accordingly.

The 28th July 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Deduction on account of Government Revenue on resumed lakheraj land (Claims for, by mortgagee who is also proprietor).

Case No. 2825 of 1864.

Special Appeal from a decision passed by the Judge of Patna, dated the 27th June 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 26th February 1864.

Doolar Chunder (Defendant), *Appellant,*

versus

Damoodur Narain (Plaintiff), *Respondent.*

Baboos Unoocool Chunder Mookerjee and *Dwarkanath Mitter* for Appellant.

Baboo Kishen Succa Mookerjee for Respondent.

A person, who is both proprietor and mortgagee, is not entitled in his capacity of mortgagee to claim a deduction on account of Government revenue paid by him to save the estate from sale for arrears of revenue when after resumption it ceased to be a lakheraj estate, which payment it was his duty to have made in his capacity of proprietor.

(The rest of this case turns merely on facts.)

On the third point (*viz.*, that Government revenue, paid on account of plaintiff's share by defendant, in order to save the estate from sale for arrears of revenue, when after resumption it became a revenue-paying est should have been credited to defenda we merely state that defendant does deny that he is mâlik of the property which, as mortgagee, he demands a deduct on account of Government revenue when the mehal ceased to be lakheraj.

Ordinarily the mortgagee, if, as such gagee *only*, he paid Government reve after resumption, might perhaps hav claim to a deduction on account of such ment, because, when he takes a lakh mehal as securing the money he advan he takes the security of the *full* asse such mehal, that is, without anythin pay out of such usufruct, for Govern revenue; and, if he has any such item to out of the usufruct, the amount of sec on which he made the advance entered the contract is by so much diminis whereas the whole policy of the Mortg Law is that the *full* security, for which original mortgage contract was made, money advanced, should be at the comm of the mortgagee.

The law, however, always contempla state of facts under which the *mort* finds it his duty, either by contract o some legal pressure, to pay the Govern revenue. Now, did the mortgagee case contract to pay this revenue, there any legal pressure under wh had to pay it? The person whos it is, in the first instance, to pay Gove revenue, is the proprietor who co to pay it and save the estate from sale; *it is only on his failing* so to do th becomes the duty of others (whose inte are prejudiced if the sale occurs) to such Government revenue. Now, here are nowhere shown that the proprietor happens to be the mortgagee himself) not accept this contract, or was not prep to pay the Government revenue. But only case before us is that the same vidual, who is proprietor, is also mortga and in the *latter* capacity volunteere pay Government revenue, which it is in way shewn that he had not the oblig or power to pay in the *former* cap We cannot allow a mâlik and mortg because they are one and the same pe to make a claim for a payment in one city, which payment it was his duty in other capacity to have made, and so to obviated the necessity of any other p with subordinate interests taking upon self to pay.

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The 28th July 1865.

Present :

Hon'ble H. V. Bayley and E. Jackson,

Judges.

signees (Liability of)—Delivery at place other than contracted for—Absence of notice of despatch and delivery.

Case No. 142 of 1865.

ular *Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 2nd March 1865.*

Mr. E. Hanlon (Defendant), *Appellant,*

versus

Bengal Coal Company (Plaintiffs) *Respondents.*

Messrs. G. C. Paul and *J. Baptist* for Appellant.

Mr. F. J. Fergusson for Respondents.

The defendant requested the plaintiffs to send coals Sahebgunge and Rajmehal, and the plaintiffs put the upon the Railway at Raneegunge where their it is. In the absence of all proof as to the amount delivered at Sahebgunge and Rajmehal, and notice of despatch and delivery to the consignee, of delivery at Raneegunge was held insufficient on him the liability for the coals sued for.

Bengal Coal Company sues Mr. E. n, as one of the members of the firm yle and Co., to recover the sum of rupees 5-11-6, as the price of coals sold and vered to them in the months of April May 1862. A decree has been given by Judge to the extent of rupees 1,024-12-3. defendant appeals, admitting a debt rupees 188-14-3, and denying all liability the remainder of the claim.

The Judge's decision appears to have been the delivery by the plaintiff of the coals Raneegunge to the Railway Company was sufficient delivery in law to Doyle and Co., that it was not necessary to prove delivery Sahebgunge and Rajmehal, where the coals re alleged by the Coal Company to have en sent.

The original contract is not put in, and we not, therefore, ascertain the special agree-nt which was entered into as regards deli-ry, if there was any such agreement. It shown and admitted that Doyle and Co. quested the Bengal Coal Company to send em so many thousand maunds of coals to jmehal at 7 annas per maund, and Saheb-ge at 7½ annas per maund, and there is e evidence to shew that the coals were upon the Railway at Raneegunge, which is the Coal Company's depôt. But evidence is altogether wanting to prove that any notice of the despatch of the coal was sent to Doyle and Co., or that Doyle and Co. received the coals. The books of the Railway Company are put in. These, however, could be no evidence alone, and they do stand alone. No witnesses are called to prove the entries in the books. These accounts might be evidence in corroboration of other evidence. But the books do not in some instances show that these consignments of coals were delivered to Doyle and Co. or to their order.

It is then said that letters were sent on behalf of the Coal Company to Doyle and Co., requesting payment of the bills for their coals, and that in their reply Doyle and Co. did not deny receipt of the coal, but merely stated that there were some outstanding accounts regarding the freight which it was necessary to settle before the account for the coals could be settled ; and that their replies contain a *quasi* admission that the coals as stated in the bills were received by Doyle and Co. If the fact of the despatch, and any letters containing the bills and vouchers for the price of the coal which is now sued for, and of the receipt of those letters by Doyle and Co., could be shown to us, we think that would be some evidence that Doyle and Co. did receive the coals, unless they in their replies denied such receipt. But no such proof is given.

The replies of Doyle and Co to these letters are put in, but they make no mention of the amount of coals received by them. Mr. Paul, on behalf of Doyle and Co., even now admits that some coals were received. The whole question in dispute is as to the quantity delivered to them. In the absence of all proof as to the amount of coals which was delivered at Sahebgunge and Rajmehal, it remains only to consider whether the Judge is right in holding that delivery at Raneegunge was a sufficient delivery to Doyle and Co. Had any notice of the delivery at Raneegunge been proved to have been sent to Doyle and Co., it might be that such delivery would have supported the Coal Company's case. But, in the absence of all notice, and such delivery and despatch to the consignees, we think the fact of delivery at Raneegunge alone is not sufficient to throw the liability for the coal now sued for on Doyle and Co.

In this view we are obliged to reverse the decision of the Judge, and to amend his decree to the amount which is admitted by Doyle and Co.

The costs of this suit will be paid by the defendant and plaintiff in proportion to the amount decreed and dismissed.

The 28th July 1865.

Present:

The Hon'ble C. Steer and G. Campbell,

Judges.

Hibbanamah (conveying share)—Mistake as to amount of share.

Case No. 716 of 1865.

Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 24th December 1864, modifying a decision passed by Baboo Peary Mohun Banerjee, Principal Sudder Ameen of that District, dated the 14th March 1863.

Momedunnissa (Plaintiff), *Appellant,*

versus

Mohumoodally and another (Defendants), *Respondents.*

Baboo Grish Chunder Ghose and *Grija Sunkur Mozoomdar* for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

A document made more than a year before the death of the maker, and not in its terms testamentary, held to operate as a hibbanamah, and to pass whatever share the person really had, notwithstanding a mistake as to the exact amount of his share.

THIS is a suit by one Momedunnissa for her own share, and for her share of the shares of her brother and sister deceased, in an ancestral talook, house, and jote, and a garden.

The defendant pleads a solanamah executed by the plaintiff in his favor, by which he claims the share of the plaintiff which she derived from her father. The solanamah has been found to be a genuine document by the Judge in the Court below; but it is contended for the plaintiff, the special appellant, that the solanamah only conveyed the plaintiff's right in succession to her father in the talook, and that the house, garden, and jote, being separate property, were not conveyed to the defendant by the solanamah. This is a good contention, and it is admitted by the other side to be so. The plaintiff must then be entitled to the share she derives in the house (which is allowedly ancestral) as one of the heirs of her father, and also of her sister in modification of the Lower Court's decree. But as the plaintiff's own allegation is that the jote is the self-acquired property of the brother an not ancestral, she can have no share in th jote as ancestral property.

In respect to the property of the broth Gohur, to which, as his sister, the plaint would be legally entitled to the extent of f share, the defendant pleads that Gohur c veyed to him all his interest in the prope in dispute by hibbanamah. This hibbanam has been found to be genuine; but it contended by the pleader for the plaint special appellant, that, admitting its ge ineness, the document is in the nature of a or death-bed gift, and can operate as l conveyance only to the extent of one-third the testator's property, and not to the wh as erroneously held by the Judge. On t point we have to observe that Gohur did die before 13 months after the execution of deed, and the deed does not, on the face of support the contention of the pleader that is in the nature of a will. At best it is dou ful whether this is the nature of the docum and as this view of it has never been ur hitherto, we do not consider that it would right to allow our argument to be based this view of the document at this late stag

It is further objected, in respect to share of the brother in the property in pute, that the first Court found, by an a ment of shares among the heirs, that deceased Gohur's share, in accordance the principles of the Mahomedan Law, more than what he conveyed to the defend by the hibbanamah, and that his client, t plaintiff, is entitled, as one of the heirs her deceased brother, to her proper share such share of her brother as he did not conv away to the defendant. But it is clear th the deceased Gohur conveyed, under the de in question, whatever his share was; and mere mis-statement as to the amount of h share does not entitle the plaintiff to consid that any reservation was made from which sh can derive any benefit.

The Lower Court has dismissed the plaint iff's claim to any part of the property o her deceased sister Khodejunnissa, on th ground that the claim in the suit is in rig of the plaintiff's father and brother; but t is admitted before us by the special respond ent that he is not able to contend that th Judge's view to this effect is a correct on in respect to such property as is proved t be ancestral, and he consents to the decree o the Lower Court being amended accord ingly, and the right of the plaintiff declare

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thereto. But though he admits that the house is ancestral, and that he is willing that the plaintiff obtain her own and her sister's share, he denies that the garden is ancestral. and, as the Lower Court has not enquired into this point, there is no other course open to us than to remand the case to have this point cleared up and settled. If the garden should prove to be ancestral, the plaintiff will be entitled to her proper share as one of the heirs of her father and sister; but if it appears to have been the self-acquired property of Gohur, the defendant's father, she will not be entitled to any part of the property.

The effect of our decision, then, is that the main the judgment of the Lower Court stands, but with some modifications. The plaintiff is entitled to the same share in the house as she would have been entitled to in the talook as one of the heirs of her father and sister, if her paternal share in the talook had not been conveyed away by her in the solanamah. She is entitled also to her proper share in the said house if that proves to be ancestral property. There appears to be no doubt that plaintiff succeeded her sister after execution of the solanamah, and that her as heir to her sister is not affected by document.

The costs of the suit will hereafter be re-adjusted in proportion as the parties have gained or lost by the action.

The 31st July 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Limitation (Act XIII. of 1848)—Suit to set aside Survey Award by Auction-purchaser subsequent to award.

Case No. 476 of 1865.

Special Appeal from a decision passed by the Judge of Purneah, dated the 19th December 1864, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 21st December 1863.

Pureeag Singh (Defendant), *Appellant,*

versus

Shib Ram Chunder Mundul (Plaintiff), *Respondent.*

Mr. C. Gregory and *Baboo Roopnath Banerjee* for Appellant.

Baboo Banee Madhub Banerjee for Respondent.

A suit to set aside an award made by the Survey Authorities is not barred by Act XIII. of 1848 when the plaintiff was no party to that award, but is an auction-purchaser at a sale for arrears of Government revenue subsequent to the award.

THE ground taken on special appeal is that the plaintiff's claim in this suit, having for its object the reversal of an award made by the Survey Authorities, is barred by the special Law of Limitation, Act XIII. of 1848, not having been brought within three years of that award.

The Judge below has held that the suit is not barred, as the plaintiff was no party to that award, but is an auction-purchaser at a sale for arrears of Government revenue subsequent to that award. There is no doubt that in this decision the Judge has followed the precedents of this and the late Sudder Court. The question was distinctly decided in the cases reported at page 1913 of the Reports for 1857, and at page 470 of the Reports for 1858; and the principle there laid down has been again held to be good law by a Full Bench of this Court in special appeal No. 2067 of 1861, reported in Sutherland's Special Number of the Weekly Reporter, containing Full Bench Rulings, page 128.

The special appeal is, therefore, dismissed with costs.

The 31st July 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Religious Endowment (created by donor at point of death)—Proof of—Joint Hindoo Family—Allegation of separate acquisition—Onus probandi—Nature of proof.

Case No. 145 of 1864.

Regular Appeal from a decision passed by Mr. C. P. Hobhouse, Judge of Midnapore, dated the 10th February 1864.

Bippro Pershad Mytee and others (Defendants), *Appellants,*

versus

Mussamut Kenae Doyee (Plaintiff), *Respondent.*

Baboos Dwarkanath Mitter, Onoocool Chunder Mookerjee, and *Sreenath Doss* for Appellants.

Baboos Aushootosh Dhur, Hem Chunder Banerjee, Mohendro Lal Shome, and *Nobo Kishen Mookerjee* for Respondent.

Clear proof is necessary to support a gift (declared orally by a person at the point of death) of all the donor's property to idols.

A member of a Joint Hindoo family, alleging separate acquisitions by himself and his father (the managers of the family property), is bound fully to prove his allegation; but the law does not impose on him so high a degree of proof as to require him to trace the funds with which each purchase of his father and himself had been made from the time of their having been acquired in a given year, to the time when they were paid to the seller of the property.

* * * * * *

THE plaintiff in the suit, Kenea Doyee, and her two unmarried sisters, are the only children of Sham Soondur Mytee, who, with his brothers, Ram Mohun and Mudden Mohun, were the sons of Brindabun Mytee, who died in 1239 possessed of property in land acquired by him at various times, sometimes in his own name, and sometimes in the name of an idol called "*Janokeebullub*," which he established. His three sons are now dead. Sham Soondur, the plaintiff's father, died in 1262; Ram Mohun died in 1263, leaving a son, the defendant Bippro Pershad; and Mudden Mohun died in 1268, leaving a son, the defendant Debnarain.

The plaintiff sued as a pauper, on behalf of herself, and, it would seem, of her minor son also. She states that her father died possessed of self-acquired property, and of his one-third share in the joint paternal property; that she, since her mother's death in 1268, has been excluded from the latter; that she has obtained, under Act XIX. of 1841 (the Curator's Act), an order of Court in her favor respecting this property; and she asks for absolute possession of a one-third share of "the joint property, *Debsheba* with the idols, rent-free lands," &c.

Bippro Pershad, the principal defendant, alleges, in answer, that his grandfather devoted the whole of his property to certain religious and charitable purposes in the name of the idol; that these trusts were orally declared by his grandfather immediately before his death in the presence of many persons, including his three sons; and that the purport of this declaration was (after endowing the idol with his whole property) that his eldest son Ram Mohun, and after him his eldest son, and so on in succession, should alone manage the property (which was to remain always undivided), and conduct the *sheba* alone, the joint family receiving only from the temple their daily food. He further claimed in his written statement a portion of the property specified in a schedule, as the separately acquired property of his father and of himself.

* * * * * *

The endowment, whatever may be its precise nature and extent, was established on its present footing without a writing by the founder Brindabun on the day of his death. That it was, in fact, formally established by him, is, we think, sufficiently proved; and it is also shown that, for many years previously, the idol existed, and the lands were acquired and held by Brindabun in its name, and that the expenses of the ceremonies, charities, &c., were defrayed from the rents of these lands. His intentions must be mainly gathered from the various accounts given by the witnesses of his last instructions. The view which his sons took of the matter during their several lives may also be important; they being persons who knew their father's intentions, and who presumably acted in conformity to them, though as to this evidence it must be borne in mind that they may, in their conduct, have disregarded his directions, or mistaken their own rights.

The evidence appears to show generally the time and the mode in which the several properties, which are the subject of the alleged endowment and of this dispute, were acquired.

The chief part of the property was purchased at different times by Brindabun. These purchases were frequently made in the idol's name. The dates of their several acquisitions range from about the year 1214 to the year 1236. During Brindabun's lifetime, his eldest son Ram Mohun acquired some lands, partly in his own name, partly in the name of his son. Ram Mohun, after his father's death, made several further acquisitions. Since Ram Mohun's death, Bippro Pershad has, at various times, also purchased lands. These purchase-deeds have, in many instances, but not always, been registered.

Of all the property thus acquired, the chief part is that which Brindabun possessed at his death. After their father's death the three brothers lived, and their descendants still continue to live, as a joint family. The plaintiff's father Sham Soondur is shown to have taken his part in the management of the property, the accounts of which were kept (at least as to a considerable portion) in the idol's name. The office of *sheba* was borne, pursuant to the supposed dire

of Brindabun, *first* by his eldest son, Ram Mohun, and afterwards by Ram Mohun's son, Bippro Pershad. We think it established that both Ram Mohun and Bippro Pershad had profitable employment agents to collect, or as managers of certain properties belonging to minors and neighbouring zemindars; and that by such means each of them may have acquired money by his own exertions, and without the aid of other members of the family, or the family funds.

* * * * * *

In support of the defendant Bippro Pershad's allegation, that his grandfather's intention was to devote his property absolutely and exclusively to *Deb* and *Ateet Sheeba*, evidence is given by the same witnesses of the application of the net proceeds to those purposes.

* * * * * *

We have, therefore, at present nothing but the evidence of a vague and general kind to support the defendant's assertion as to the application of the net proceeds of the property.

* * * * * *

Where the trust itself is one declared by word of mouth by a person at the point of death and is in terms by no means clearly indicating an intention on the part of the testator to deprive his family of all substantial enjoyment of his property, the Court should fairly require the fullest proof in support of such a trust. It cannot be said that the defendant has given such proof hitherto, and in an ordinary case we should be disposed to allow a further opportunity of supplying any defects in the evidence. But in the present suit the defendant has perhaps been somewhat misled by the form of the plaintiff's suit.

The plaintiff in her plaint ignores any fictious trust whatsoever, and asked for possession of share of the property. In the progress of the suit the existence of the endowment has been ascertained, and it is not until a late stage of the suit that the question, as to the exact extent of the endowment, has formally arisen. We think that an opportunity should even now be given to the defendant Bippro Pershad, and those in the same interest, to produce any evidence other than oral, which may be in their favor to show the actual account of expenditure on *Deb* and *Ateet Sheeba* during Brindabun's time, and subsequently during the time of Bippro Pershad and his father, especially the written accounts (if any exist) of such expenditure. We shall not finally decide the appeal until this evidence (if any such can be adduced) has been given.

With respect to the *second* issue concerning the alleged separate acquisition of Bippro Pershad and his father, * * * * * * the Court rightly held (seeing that Bippro Pershad and his father were members of a joint family living together, and especially as they were successively the heads of the family having the management and control of the joint property) that Bippro Pershad was bound to prove his allegation that the lands claimed by him had been acquired by his father and himself by means of their own separate funds, and on their own account.

The appellant objected, and we think justly, to that part of the judgment in which the Court states in the following terms the extent of proof incumbent on him: "The Court holds that it has "a right to require from Bippro Pershad "the clearest and most unmistakeable "proofs—*first*, that in such and such years he "and his father, by such and such means, "acquired such and such private funds; "and, *secondly*, that it was out of those very "funds that the alleged self-acquired estates "in dispute were, from time to time, ac-"quired." The burden of proof, in cases of alleged separate acquisitions by a member of an undivided family possessed of joint estate, is upon the person who advances such a claim; but he may fairly, we think, be deemed to have sufficiently acquitted himself of it by evidence falling far short of that required by the Court below, which would impose on Bippro Pershad the task of tracing the "very funds" with which each purchase of his father and himself had been made from the time of their having been acquired in a given year to the moment when they were paid to the seller of the property.

It has been stated in several decisions that the mere purchase of property in the name of one member of a joint family, and the taking receipts in his name, are insufficient to support a claim by that person to an exclusive right of property; for they are as consistent with the notion that the property belongs to the joint family as that it is separate. Acts of ownership openly exercised by or on behalf of the individual member within the knowledge of the other members of the joint family, and assented to or not opposed by them, may be

equally equivocal; for the acts may be of such a description as are beneficial to the joint estate, or necessary for its protection. But when the acts of ownership amount to assertions of sole ownership, in exclusion of all joint right or interest in others, and are of a kind beneficial to the individual member alone, the acquiescence of the other members, unless clearly explained, is a strong admission in support of the separate and exclusive right, whether it may arise from purchase or partition. An important criterion in cases of alleged separate acquisition (by private funds) has been said to be to consider from what source the money comes with which the purchase was made. But no rule is stated as to any particular mode of proof in such cases. If *A*, being a member of a joint Hindoo family, is shown to have a separate employment, yielding him a given income, and he buys land in his own name at a price not wholly out of proportion to the sum which his own separate income may fairly be supposed to place at his command, the deed being registered, and the land held openly by him as his own exclusive property, and the proceeds applied to his own use without the interference of other members of the joint famiy, it might, we think, be fairly deduced from these facts, if established to the Court's satisfaction, that the land was *A's* separately acquired estate, although no proof was forthcoming to show that the very money separately acquired was that which was afterwards paid to the vendor. In the present case it would scarcely be possible for Bippro Pershad to adduce such proof with respect to his father's acquisition in former years; and we conceive that in no case can it be stated (without regard to peculiar circumstances) that the Court is bound to require proof of the strict kind stated by the Court below, before coming to a conclusion in favor of the alleged separate acquisition.

The 31st July 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Appeal from order given on arbitration award—Refusal of arbitrators to amend a bad award.

Case No. 221 of 1865.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 12th December 1864, affirming a decision passed by the Principal Sudder Ameen of th District, dated the 19th March 1864.

Deb Narain Singh and others (Defendant *Appellants,*

versus

Rajmonee Koonwur and others (Plaintiffs) *Respondents.*

Moonshee Ameer Ali Khan Bahadoor a *Baboos Dwarkanath Mitter* and *Unno Pershad Banerjee* for Appellants.

Messrs. R. T. Allan. A. F. Lingham, *C. Gregory,* and *Baboos Onoocool Chu Mookerjee* and *Mohesh Chunder Chow* for Respondents.

An appeal lies from a judgment given on an arbitr award on the ground that the judgment is contrary the award.

The refusal of arbitrators to amend a clearly award is misconduct on their part within the mean of Section 324, Act VIII of 1859, justifying its b set aside.

THIS was a suit by the plaintiff as heire of Sheo Pershad Singh, deceased. Defen ant pleaded his adoption by the decease and a tumleeknamah in his favor. T case was referred to arbitrators; but t Principal Sudder Ameen, in a careless a censurable way, unfortunately too comm neglected to draw up the proper and pre arbitration order required by Section of the Civil Procedure Code, and much c fusion has resulted in consequence. Un the vague terms of the order in the file think it must be considered that the w case was referred to the arbitrators a arose on the issues previously drawn. arbitrators treated those issues much m precisely than the Judge (whose is were very wandering) and found distinctly—

1. That the defendant *was* adopted the deceased; but

2. That the tumleeknamah propoun by him was not a true and genuine do ment.

If they had stopped there, we can h no doubt that the verdict should have b entered for the defendant upon the issue. But the arbitrators went on to find

3. That, as neither party had wh spoken the truth, and the defendant claims of relationship, while the plain and her two daughters had also claims, property should be equally divided into t

This last was a manifestly illegal a beyond the power of the arbitrators, fit to be remitted for amendment un

Section 323. The Principal Sudder Ameen was, therefore, right in remitting it as he did. But, besides pointing out what really required amendment, he went beyond his province by taking upon himself to tell the arbitrators that their finding of the fact of adoption was founded on hearsay and insufficient evidence.

The arbitrators absolutely refused to revise the award.

Upon this the Principal Sudder Ameen, rejecting, not only the part of the award which was illegal and *ultrâ vires*, but also a simple finding of fact in favor of the adoption, accepted only that part of the award which rejected the tumleeknamah, and thereupon decreed in favor of plaintiff.

The Judge rejected the appeal as founded on an arbitration award, and not subject to appeal. The defendants, therefore, appeal specially to this Court. It is clear to us that a judgment given on an arbitration award is final under Section 325, when it is given *according to the* award, but not otherwise; and that an appeal lies on the ground that it is contrary to the award.

In this case the judgment is, we think, not contrary to the award. It does not reject the decision of the arbitrators. It does not even, rejecting the illegal portion of the award, accept the fact found as a final verdict, and pass judgment in accordance therewith for the defendant. It rejects the main fact favorable to the defendant; and, accepting the other finding of fact favorable to the plaintiff, decreed in direct opposition to the award in a manner which can in no way be justified. The judgment must, without doubt, be set aside.

A more difficult question is whether the illegal part of the award being set aside as surplusage, the proper course is to accept the remaining findings. If the reference had been on a special case and special issues, it might be so; but the reference being general and unlimited, we do not think that, with regard to Section 322, we may alter and amend the award so as to vary the decision which gave half the property to the plaintiff. The Court in such a case must accept the decision in whole, or remit it to be revised. Now, it has been properly remitted, and the arbitrators have refused to revise. We think that this refusal to amend a clearly bad award is misconduct on their part within the meaning of Section 325. We, therefore, set aside the award on this ground, and remand the case to be tried by the Court itself. The fact of adoption and the genuineness of the tumleeknamah are distinct and separate issues. If either be found in favor of defendant, he will have a verdict. If both are found against him, plaintiff will have a verdict. We direct the Judge to take the case on his own file and try it.

The 1st August 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Suit for false and malicious prosecution—Proof of charge being made maliciously and without probable cause.

Case No. 389 of 1865.

Special Appeal from a decision passed by Pundit Sreenath Bidyabagish, Principal Sudder Ameen of Dinagepore, dated the 2nd December 1864, reversing a decision of Moulvie Abdool Mujeed Khan, Sudder Ameen of that District, dated the 27th May 1864.

Nowcouree Chunder Shurmah (Plaintiff), *Appellant,*

versus

Birmomoyee Dabea (Defendant), *Respondent.*

Baboo Anund Gopal Paulit for Appellant.

Baboos Prosunno Coomar Sein and *Mohesh Chunder Chowdry* for Respondent.

The mere failure to obtain a conviction on a criminal charge against a person does not entitle him to sue for false and malicious prosecution. In order to maintain such a suit, he must show that the criminal charge was instituted maliciously and without probable cause.

WHETHER the plaintiff was named to the police as the person suspected of the so-called "burglary" or not, it is highly probable that the criminal proceedings against him, including his arrest, arose immediately from the acts of the defendants Birmomoyee and her servant Gobind Doss, who set the police in motion. The question is, whether they, the defendants, acted fairly (and the Principal Sudder Ameen is satisfied that they did), having merely given information to the police that such an offence had been committed, without, in the first instance, if at all, charging the plaintiff. The plaintiff lodging in the house that night, suspicion fell on him, and he was ultimately charged; but there is no evidence to show that he was charged maliciously or without probable cause by either defend-

ant. The Court of first instance, finding that the charge wholly failed against the plaintiff, appears to think that such failure entitles him to sue for false and malicious prosecution. But he is bound, in order to maintain the suit, to show that the criminal charge was instituted without probable cause and maliciously. We dismiss the appeal with costs.

The 1st August 1865.

Present:

The Hon'ble C. Steer and G. Campbell, *Judges.*

Jurisdiction (of Civil Court)—Ejectment (under Section 25, Act X. of 1859)—Suit to establish right to the land.

Case No. 341 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly. dated the 17th November 1864, reversing a decision passed by the Moonsiff of that District, dated the 18th January 1864.

Joteeram Kharah and others (Plaintiffs), *Appellants,*

versus

Ram Coomar Singh and others (Defendants). *Respondents.*

Baboo Gopeenath Mookerjee for Appellants.

Baboo Nil Madhub Bose for Respondents.

A person is entitled to sue in the Civil Court to establish his right to land from which he has been ejected by his zemindar by virtue of a decree under Section 25, Act X. of 1859, whether the plaintiff was or was not a party to the ejectment suit.

It appears that the zemindar defendant brought a suit against Shama Churn, the son of the plaintiff in this regular suit, under Section 25, Act X. of 1859, for ejectment. That case was disposed of on Shama Churn's admission, and the present plaintiff tried to intervene, but his petition was rejected. He now sues to establish his title to the land, and the Principal Sudder Ameen has held that such a suit will not lie in the Civil Court.

We think the Principal Sudder Ameen is clearly wrong. The plaintiff was not a party to the ejectment suit, and, as a stranger, he would be entitled to bring an action to establish his right to land from which the zemindar has ousted him under color of a suit against another party. But, if the plaintiff had been a party to the case under Section 25, Act X. of 1859, he would still have been entitled, by a ruling of the Full Be of the High Court, to sue in the Civil Co to establish his right to the land from wh his zemindar had, by a summary applicati succeeded in ejecting him.

The case must, therefore, be remanded tne Lower Appellate Court to decide u the plaintiff's title to the land.

The 1st August 1865.

Present:

The Hon'ble G. Loch and F. A. Gl *Judges.*

Suit for contribution—Decree to specify payable by each defaulter.

Case No. 428 of 1864.

Regular Appeal from a decision passed the Principal Sudder Ameen of Mym sing, dated the 26th August 1864.

Bama Soondureé Debia (Defendant), *Appellant,*

versus

Anund Moyee Debia (Plaintiff) and o (Defendants), *Respondents.*

Baboos Onoocool Chunder Mookerje Nil Madhub Sein for Appellan

Baboos Kishen Kishore Ghose, Sy Doss, and *Hem Chunder Banerje* Respondents.

Suit laid at rupees 9,577-7-9.

In a suit for contribution, a decree cannot pass against all the defaulters; but it should specify particular sums to be paid by each.

This was a suit for contribution. plaintiff who is the respondent before and the present defendants, were all fendants in a suit brought in the Sy Zillah Court by Mahomed Ajub Cho for possession of certain land belongin his estate, and for the mesne-profits accr during the period of ouster.

A decree was given in the first inst for possession, and afterwards for the me profits against all the parties to the pre suit.

In execution of his decree, Maho Ajub Chowdry attached an ancestral t belonging to the respondent, or rather to minor son of whom she was the guard and to save the estate from sale, A

d

Mopa Debia paid the entire amount due on the decree.

The Principal Sudder Ameen has decreed in favor jointly against all the defendants.

It is urged in appeal that, as the respondent in the case has already admitted in another suit that she was in possession of the entire estate, she is estopped now from suing for contribution.

We think this objection untenable. The statement made by the respondent was evidently disbelieved by the Court which tried the case, and a decree was given jointly against all the defendants. It appears, moreover, that the present appellant appealed against that decision unsuccessfully, and it would be impossible for us now to interfere, however much we might feel assured of the appellant's non-liability, inasmuch as we would be reversing the decree of a competent Court, which we have no power to do.

The appellant might, had she chosen, have applied to the Court which decided the original case for a review of judgment.

The reason why she neglected to do so is clearly to be found in her answer to the final suit, in which, notwithstanding the flat denial, she clearly asserts herself to be in possession of an 8 annas share of the disputed property.

We see, therefore, no reason to interfere with the Principal Sudder Ameen's order, so far as it regards the respondent's right to recover the extra payment she has made; but, in accordance with former rulings of this Court, a decree cannot pass jointly against all the defaulters. The order must specify the particular sums to be paid by each.

As we have on the record sufficient evidence to determine the point, we think it right to do so, and not to cause further delay by remanding the case. Respondent holds admittedly a 4 annas share; Kashee Kishore the same quantity; and, according to her own statement in the original suit, the appellant alone was in possession of the remaining 8 annas. The sum claimed by the appellant must be divided in this proportion. Of the whole sum paid, appellant will pay one-half, Kashee Kishore one-fourth, with interest from the date of the respondent's payment in satisfaction of Mahomed Ajub's decree.

The costs of this appeal will be paid by the appellant. Kashee Kishore will pay his costs in the Lower Court, and Bama Soonree Debia all the rest.

The 1st August 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Sale (by one of two debtors of attached property belonging to both)—Bona fide purchase unavailing.

Case No. 164 of 1865.

Regular Appeal from a decision passed by Mr. W. DaCosta, Officiating Principal Sudder Ameen of Purneah, dated the 2nd March 1865.

Mirza Lotfoolia Khan (Plaintiff), *Appellant,*

versus

Rajah Leelanund Singh Bahadoor (Defendant), *Respondent.*

Mr. C. Gregory for Appellant.

Moonshee Ameer Ali and *Baboo Unnoda Pershad Banerjee* for Respondent.

Suit laid at rupees 2,302-8 as.

A *boná fide* purchase for good consideration of attached property belonging to two debtors cannot avail to pass the rights of both when the sale is made by one of them in whose name the property stands.

We think the order of the Lower Court in this case must be affirmed. The defendant, Rajah Leelanund Singh, held three decrees, two of which were against Ishuree Pershad and Luchmee Pershad, and the third against Doorga Pershad and Luchmee Pershad. In execution of these decrees, the property, which is the subject of litigation, belonging, as is proved by the evidence both of plaintiff and defendant, to be the joint property of Ishuree Pershad and Luchmee Pershad, was attached on the 16th Bhadro 1271, after an injunction forbidding alienation had been issued on the 12th of the same month.

Notwithstanding the injunction and attachment, Ishuree Pershad sold the property in dispute, as belonging wholly to himself, to the plaintiff, and paid off the two decrees against himself and Luchmee Pershad. There remained, however, the third decree against Luchmee Pershad, for which his share in the property still continued liable; and the Judge has held that the plaintiff is entitled only to the share of Ishuree Pershad, but not to Luchmee Pershad's, which was not sold, and, if sold, illegally sold.

We cannot admit the plea taken by the appellant that, as he was a *bonâ fide* purchaser for good consideration, he cannot suffer: for, in the *first* place, the sale was itself illegal, and might, on the application of the decree-holder, have been wholly set aside;

and, *secondly*, Ishuree Pershad could not sell the rights of Luchmee Pershad. We dismiss the appeal with costs.

The 2nd August 1865.

Present :

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Enhancement of rent — Applicability of Section 51, Regulation VIII., 1793.

Case No. 1159 of 1865.

Special Appeal from a decision passed by the Second Principal Sudder Ameen of the 24-Pergunnahs, dated the 30th December 1864, modifying a decision passed by the Sudder Ameen of that District, dated the 31st May 1864.

Kaleedhun Banerjee and others (Defendants), *Appellants,*

versus

Romesh Chunder Dutt (Plaintiff), *Respondent.*

Baboos Onoocool Chunder Mookerjee and *Upprokash Chunder Mookerjee* for Appellants.

Baboo Greeja Sunkur Mojoomdar for Respondent.

Section 51, Regulation VIII., 1793, refers solely to dependent talookdars, and cannot be applied so as to protect from enhancement persons whose tenure is terminable at the end of any year, or at the pleasure or caprice of his zemindar.

Prior to Act X. of 1859, a zemindar was not prevented (unless otherwise expressly restricted) from enhancing the rent of a tenant who could not prove payment of a fixed rent for 12 years before the Permanent Settlement.

THIS was a suit by the special respondent (plaintiff in the Court below) to enhance the rent on certain lands belonging to his zemindary, and in the possession of the defendants.

They objected that part of the land was "lakheraj," and part covered by a pottah granted by the Collector in 1786 A. D., and confirmed by the then zemindar some years later. This pottah, they contended, gave them an hereditary right to hold at fixed rates.

The first Court held these pottahs to be genuine, and decided that the only land liable to assessment was a trifling excess of 13 cottahs, which had been found on measurement in defendant's possession over and above the quantity covered by their documents.

The Principal Sudder Ameen modi[illegible] this order. He allowed the 8 beegahs [illegible] cottah of lakheraj; but, with regard to t[illegible] rest, found for the zemindar, on the grou[illegible] that the second pottah filed by the defenda[illegible] was spurious, and that the Collector's pott[illegible] extended to 1786 only, and did not give t[illegible] ryots protection against enhancement.

Both parties appeal against this decisi[illegible] the ryots in the usual course, the zemin[illegible] under Section 348 of Act VIII. of 1859.

It will be convenient to dispose of [illegible] latter's objections first. He urges that [illegible] denied *first* the authenticity of the Collect[illegible] pottah, and, *secondly*, his power to grant [illegible]

We do not think that either of t[illegible] objections can be entertained now. Do[illegible] less, the plaintiff did mention them in [illegible] petition of appeal to the Principal Sud[illegible] Ameen; but it is equally clear that he d[illegible] not bring them prominently forward, or r[illegible] his case upon them. Had he done so, t[illegible] Principal Sudder Ameen must have notice[illegible] them; indeed, his decision of the case mu[illegible] per force have turned upon them. It is, [illegible] we know from experience, a very comm[illegible] thing for appellants to file a large number [illegible] objections, and then abandon all but the [illegible] or two on which they hope to succeed; [illegible] it would be altogether improper to a[illegible] them in special appeal to take up old p[illegible] which they never mentioned to the [illegible] Court, or relied on in support of their a[illegible] as a ground for remanding the case for [illegible] ther enquiry. The Collector's pottah [illegible] found to be genuine by the first Court, [illegible] was practically not contested in the seco[illegible] The same remarks apply to the objection [illegible] the Collector had no power to grant [illegible] pottah, with this addition, that the docum[illegible] does not profess to be a mokurruree pott[illegible] After circumstances may have implie[illegible] given it that construction; but, on the f[illegible] of it, the pottah is only a lease year by y[illegible] at a certain rent.

We, therefore, reject the cross-appeal.

The defendant appeals specially, urging [illegible]

(1).—That Section 51 of Regulation VI[illegible] of 1793 applies to tenures like this; and

(2).—That the special respondent, w[illegible] is only a purchaser at a private sale, cann[illegible] enhance the rent of ryots who have held [illegible] a uniform rate from before the Decennial S[illegible] tlement.

On the first point, we have no doubt t[illegible] the Principal Sudder Ameen was ri[illegible] Section 51 of the Regulation quoted re[illegible] solely to dependent talookdars, and cann[illegible] be applied to persons like the special app[illegible]

but whose tenure was one terminable at the end of any year at the pleasure or caprice of his zemindar. The words of the pottah are very distinct. The ryot is to cultivate so much land year by year, and is to pay so much rent. There is not a word in it that the tenure is to be heritable, or that the rent specified in it is not to be enhanced. But, had it been sufficient for the ryot to have continuous possession at a uniform rate of rent from the date of the Perpetual Settlement, we should have been inclined to assume these points in his favor, for, rightly or wrongly, no doubt, he and his ancestors have held this land at one rate of rent from the date of the pottah, and the proprietor of the estate has never questioned his right to hold. But, unfortunately for the special appellant when this case was instituted, Act X of 1859 had not been passed, and there was no law to prevent a zemindar not otherwise restricted, as by some valid act of his predecessor for example, from enhancing the rent of a tenant who could not show payment of a fixed rent for 12 years antecedent to the Perpetual Settlement. Had the second pottah been found to be genuine, the special respondent would have been bound by his predecessor's acts. As it stands, admitting the genuineness of the grantor's pottah, that will carry the special appellant's title back only to the year 1786 A.D., which is some years short of the Settlement time. A Divisional Bench of this Court has, we observe, decided a similar case in similar manner. (2 Wyman's Reports, 266, Romesh Chunder Dutt, plaintiff, appellant).

We, therefore, dismiss the special appeal with costs.

The 2nd August 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Hindoo Law—Suit for share in joint family property—Onus probandi.

Case No. 251 of 1865.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 22nd September 1864, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 11th January 1864.

Umbika Churn Shet (Plaintiff), *Appellant,*

versus

Bhuggobutty Churn Shet and others (Defendants), *Respondents.*

Mr. R. E. Twidale and *Baboo Rajendur Misser* for Appellant.

Baboos Dwarkanath Mitter and *Shib Chunder Mojoomdar* for Respondents.

In a suit for a share in a joint-family property, the *onus* of proving joint enjoyment of the property within 12 years is on the plaintiff. Proof by the plaintiff of receipt of payment on account of his share within 12 years will save his suit from limitation under Clause 13, Section 1, Act XIV. of 1859, and throw on the defendant the *onus* of proving his plea of separate property.

THIS was a suit for a share in a family property. The defendants, admitting plaintiff's claim to a share in certain of the family properties as still held joint, denies his right to the others as being defendant's own self-acquisitions. It appears to be admitted by both parties that plaintiff (then a minor) with his brother separated in mess more than 12 years before suit, and the Judge, considering that it was clear on plaintiff's own admissions that he had no possession in the disputed properties within 12 years, dismissed the suit on the ground of limitation. In special appeal, it is urged that the ordinary presumption of a Hindoo joint family throws the *onus* of proving separate property on defendant. Respondent replies as a preliminary point, and we think rightly that, however this may be, the course was expressly provided for by Clause 13, Section 1, Act XIV. of 1859, which enacts that a suit to enforce a share in a joint family must be brought within 12 years of possession or enjoyment. That enactment throws, we think, on plaintiff, in such cases, the *onus* of proving a joint enjoyment of the property within 12 years.

But appellant now urges (and under the circumstances we admit the plea, though not directly taken in the written grounds) that plaintiff and his witnesses state that he received three rupees per month, as one of the family, up to a period within 12 years of suit; and that this is a payment on account of his share which will save his limitation in the terms of Clause 13. We think that this contention is correct, and that the Judge has not disposed of the plea, he considering that, if true, it is no possession. We, therefore, remand the case to try the alleged receipt of three rupees monthly by plaintiff within 12

years; if it be proved, he is within time, and in that case it will then rest on defendant to prove his plea of separate property.

The 2nd August 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Limitation—Suit to recover property respecting which no final award has been passed under Act IV. of 1840.

Case No. 925 of 1865.

Special Appeal from a decision passed by the Judge of Behar, dated the 17th January 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 6th May 1864.

Dyram Sahoo (Plaintiff), *Appellant,*

versus

Beebee Sograh (Defendant), *Respondent.*

Baboo Kishen Succa Mookerjee for Appellant.

Mr. C. Gregory for Respondent.

A suit to recover property respecting which no final award has been passed under Act IV. of 1840 is not barred by limitation under Clause 7, Section 1, Act XIV. of 1859, but may be brought within 12 years from date of ouster.

THE Judge has held that the suit of the plaintiff is barred. Clause 7, Section 1, Act XIV. of 1859, is quoted.

We think that the Judge is wrong. The plaintiff is not bound by any award respecting possession of property passed under the provisions of Act IV., inasmuch as there was no final award in the case, which was struck off the file. The present suit has been brought within 12 years from date of ouster, and is consequently in time.

Remanded for trial to the first Court on the merits.

The 6th July 1865.

Present:

The Hon'ble *Sir* Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble W. Morgan and F. A. Glover, *Judges.*

Mortgage—Redemption by mortgagor of lakheraj land subsequently assessed with revenue.

Case No. 473 of 1865.

Special Appeal from a decision passed by Moulvie Itrut Hossein, Principal Sudder Ameen of Sarun, dated the 12th December 1864, modifying a decision of Moulvie Syed Fuzeeooddeen Khan, Sudder Ameen of that District, dated the 7th July 1864.

Joyprokash Roy and others (Defendants), *Appellants,*

versus

Oorjhan Jha and others (Plaintiffs), *Respondents.*

Baboo Mohesh Chunder Chowdhry for Appellants.

Mr. C. Gregory and *Baboo Dwarkanath Mitter* for Respondents.

A mortgagor of lakheraj land subsequently assessed with Government revenue is not entitled to redeem except on payment of the amount paid by the mortgagee to Government for revenue, with interest, in addition to the money due under the mortgage. But in a suit for redemption in which the mortgagor deposited before suit the amount of the principal sum borrowed by him he is entitled to a decree on payment into Court of the further sum paid for Government revenue.

Glover, J.—THIS was a suit by the special respondent, the representative of a mortgagor, to redeem his property from the hands of the special appellant, who was the mortgagee, on payment of the sum originally lent.

It appears that, after the mortgage was executed, Government resumed the land heretofore held as lakheraj, and made a settlement with the special appellant, as the party in possession, at a yearly rent of 75 rupees.

The point in dispute in this case was who was to pay this rent, the mortgagor or the mortgagee?

The Court of first instance decided that the plaintiff was entitled to recover possession of his land on payment of the mortgage-money mentioned in the bond; and that the mortgagee must bring a separate suit for what he had paid as rent.

The Principal Sudder Ameen agreed in giving the mortgagor possession, but added that the mortgagee's payments of Government revenue, being voluntary payments, were irrecoverable, and that no action would lie for them. With the latter part of this judgment I concur; it having been ruled by the Sudder Dewanny Adawlut, in the case of Musst. Beebee Waheedun, plaintiff appellant, decided 30th November 18[illegible], that a mortgagee in possession, paying Government revenue, cannot, so long as he remains in possession, bring a separate action for reimbursement against the mortgagor

This disposes of the first objection taken in this appeal.

As, with regard to the other, I think that before the mortgagor can recover possession of his land, he must pay what the mortgagee has disbursed as Government revenue. When the contract was entered into between the parties, the land was "lakheraj," and no stipulation, therefore, as to payment of rent was necessary; but now that Government has imposed a distinct burthen on the property in the shape of revenue, non-payment of which involves the forfeiture of the land itself, it would be altogether inequitable to throw it on the mortgagee, and give the mortgagor an advantage never contemplated when the mortgage was entered into.

The amount of Government revenue paid under the circumstances of this case should be added with interest to the sum advanced by the mortgagee, and the mortgagor should be required to reimburse both amounts before he can be allowed to recover possession of the land.

I would amend the Lower Court's judgment so far, decreeing this appeal with costs to the respondent.

Morgan, J.—I think the plaintiff's suit for redemption must fail, this not being an ordinary case within the Regulation which enables a mortgagor to redeem his property on payment of the principal sum. The land (which at the time of the mortgage was held as lakheraj) having been subsequently assessed with Government revenue, which the mortgagee has paid, he has a claim in respect of the amount so paid, which is the plaintiff's right under the Regulation to redeem on deposit of the principal sum (*see* the Decisions, Special Appeal, No. 3611 of 1864, 1st May 1857).

I think the judgment of the Lower Courts should be reversed, and this appeal allowed with costs.

Peacock, C. J.—I think the decision of Mr. Justice Glover is right in this case. This is a suit substantially brought to redeem a mortgage. But inasmuch as the land which was formerly lakheraj has been assessed with Government revenue, and the mortgagee has been obliged to pay the Government revenue in order to save the land, he is entitled to have that money returned to him.

Under these circumstances, I concur with Mr. Justice Glover that the plaintiff is entitled to redeem upon paying into Court the sum paid to Government for revenue, with interest thereon at the rate of 12 per cent. per annum, in addition to the money due under the mortgage. The amount paid for revenue and interest to be ascertained in execution.

The decree of the Lower Court will be amended accordingly, and this appeal decreed with costs be paid by the respondent.

The 2nd August 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Appeal (by lessor from dismissal of lessee's suit, after expiration of lease).

Case No. 115 of 1865.

Regular Appeal from a decision passed by Mr. H. C. Richardson, Officiating Additional Judge of Jessore dated the 12th July 1865.

The Commissioner of Soonderbunds (one of the Defendants), *Appellant,*

versus

Chunder Coomar Ghose and others (Plaintiffs and Defendants), *Respondents.*

Baboo Kishen Kishore Ghose for Appellant.

Baboos Unnopadersaud Banerjee, Gopal Lall Mitter, Kalee Mohun Doss, Omesh Chunder Mitter, Hem Chunder Banerjee, Poorno Chunder Mookerjee, Obhoy Churn Bose, and *Romanath Bose* for Respondents.

A lessor cannot, after the expiration of the lessee's lease, appeal from the dismissal of the lessee's suit concerning a boundary dispute.

THE plaintiff in this suit was a lease-holder for 20 years, and at the present time all rights of the plaintiff under that lease have expired. The dispute below, between the plaintiff and the substantial defendant, was concerning a boundary, and the Court below dismissed the suit of the plaintiff. In this suit, the Government was made a formal defendant. As such defendant, it could not interplead with the substantial defendant, and, on this or on other grounds, the Court below refused to grant the application of the Government to order a fresh local investigation, the one made by the Court having been completed before Government was made a defendant.

The Government now appeals on the ground that the investigation is imperfect.

As the plaintiff held only a temporary interest, after the expiration of that right, Government, as the proprietor of the lands

leased to the plaintiff, cannot now be allowed by an appeal to carry on the litigation in succession to the plaintiff. It is true the Government was a party to the suit, but only in the manner above-stated; and the dismissal of the claim of the plaintiff cannot prejudice or affect any right of the Government. The proper course for the Government is to bring a fresh suit to assert its rights. This appeal is dismissed with costs.

The 3rd August 1865.

Present:

The Hon'ble W. S. Seton-Karr and F. A. Glover, *Judges.*

Limitation—Suit by purchaser at a private sale—Ejectment of Lakherajdars—Concurrent jurisdiction.

Case No. 1410 of 1864.

Special Appeal from a decision passed by the Judge of Sarun, dated the 21st February 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 5th December 1864.

Bhikaree Pandah and others (Defendants), *Appellants,*

versus

Ajoodhya Pershad and others (Plaintiffs), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellants.

Baboos Onoocool Chunder Mookerjee and *Dwarkanath Mitter* for Respondents.

A purchaser at a private sale cannot count limitation from the date of his purchase, but from the date of accrual of the original vendor's title.

A party suing under Section 28, Act X. of 1859, can not, if he fail in that suit, bring another and similar suit in the Civil Court. Both Courts have concurrent jurisdiction, but a suitor must elect one or the other.

THERE are several objections taken in special appeal, but it is unnecessary for us to consider more than one, as the Judge is, in our opinion, clearly wrong on the issue of limitation.

He has held that a purchaser at a private sale (this suit, it must be remembered, was instituted after the passing of Act XIV. of 1859) is entitled to count his time for instituting a suit from the date of his purchase. If this were so, limitation could not be applied at all, for every private purchaser would get a fresh start on every succeeding conveyance. Such a purchaser cannot be in any higher position than th of his vendor; and, again, his time for sui would count from the date of original accru of title, and so on. The special responde in this case must go back to the date original vendor's title accrued, and count 12 years from them. The point has freque ly been ruled by this Court, and we acco ingly reverse the Judge's decision, remand the case for trial on the merits. call at the same time the Judge's attention the ruling of this Court (2 Weekly Report Act X. Rulings, p. 102) which lays it down a party suing under Section 28 of Act X 1859 cannot, if he fail in that suit, b another and similar one in the Civil Co Both Courts have concurrent jurisdiction, a suitor must elect one or the other.

The 3rd August 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackso *Judges.*

Judgment (Reasons of, to be recorded).

Case No. 1064 of 1865.

Special Appeal from a decision passed the Principal Sudder Ameen of Da dated the 25th November 1864, aff ing a decision passed by the Moonsi Naraingunge, dated the 14th March

Trilochun Dutt (Defendant), *Appellan*

versus

Ishen Chunder Chowdhry (Plaintiff), *Respondent.*

Baboo Motee Lall Mookerjee for Appell

Baboo Nil Madhub Sein for Responde

A Court instead of contenting itself with saying on the plaintiff's or defendant's evidence, &c., it the plaintiff's or defendant's claim proved, should state what that evidence consists of, and in what or for what specific reasons it proves the plaintiff defendant's case.

IN this case both plaintiff and defend claim to hold certain land on title-de derived through one Mohanund.

Both Courts have found the plaintiff's t deed to be earlier in date, and the plai to have been in possession.

But the Principal Sudder Ameen, Pennington, has stated little more than t on the plaintiff's evidence, he finds the in plaintiff's favor, and that the defenda evidence, even if it proves the defenda title-deed to be good, cannot avail him agai

tiff's earlier deed. His whole judg- contained in these words:—

intiff lays his claim to his share in 6 k. 1 k. of land, and says that he purchased me from Mohanund on the 19th Bysack and was in possession; but from 1267 endant has dispossessed him.

Defendant says the disputed land was by Mohanund to his mother on 27th r 1258, and, on the death of the mother, purchased the same from Mohanund on 10th Joist 1263, from which date he has in possession.

Moonsiff decreed the case against which defendant appeals.

Now, I have to see whose purchase is , and, before the dispossession, who was possession.

"From the plaintiff's registered kubala tta, kubooleut and witnesses, it has been ed that the plaintiff is the real purchaser, was in possession, and the kubala was stered some months after by Mohanund elf, when the defendant registered his; that again the defendant, to prove the , has filed in this Court the Deputy Col- 's roobakaree in which the gift appears; t does not signify, because the plaint- bala is prior to that of the defend- o the appeal is dismissed with costs."

ppears that the plaintiff's deed, though in date, was not registered until three after its execution. The Principal er Ameen has erred in fact in alluding his circumstance, as he states that the y was only for some *months*. The Prin- Sudder Ameen also says that plaintiff defendant registered at the same time; eas the one was registered in 1854, the in 1857. It is possible that this may had a material effect on the decision of Lower Court, and we, therefore, remand case to him for re-decision.

We take the opportunity to remark that, think the Principal Sudder Ameen should r into the case, and record his reasons arriving at his conclusion. In this case in other cases decided by Mr. Pennington, ch have been before us, we find that he ents himself with saying that, on the tiff's evidence, &c., he finds the plaintiff's fendant's claim proved. He should also what that evidence consists of, and in h way, and for what specific reasons, it the plaintiff's case. As respects the t suit also, it may be that, although intiff's evidence proves plaintiff's pos- , still the defendant's evidence may that proof, and, on weighing the evidence on both sides, that of the defendant may prevail. Mr. Pennington does not allude to the defendant's evidence, and it would appear as if he had never considered it. Now, the question as to the plaintiff's title-deed being valid and genuine as against the defendant's deed, depends in a great measure on the point of possession, as it is not the signature on the deed which is in dispute, so much as the date on which it was really executed and came into effect.

We reverse the judgment passed, and remand the case in order that it may be re-tried in reference to the above remarks, and a full and careful decision recorded upon it.

The costs of this appeal will fall on the party who loses the case finally.

The 3rd August 1865.

Present:

The Hon'ble W. S. Seton-Karr and F. A. Glover, *Judges.*

Tanks (Resumption of).

Case No. 1282 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 24th January 1865, reversing a decision passed by the Moonsiff of that District, dated the 14th July 1863.

Chunder Cant Chuckerbutty (Plaintiff), *Appellant,*

versus

Bunko Beharee Chunder and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Poorno Chunder Mookerjee for Respondents.

A zemindar is entitled to resume land helds under an invalid grant or no grant at all, in which a tank was allowed to be excavated by the defendant, not for the public benefit, but for a *bonus*.

We are unable to understand the legal grounds on which the Principal Sudder Ameen has proceeded in disallowing the plaintiff's right to resume the tank which the first Court had allowed. The case at first sight might appear to fall under the ruling of the Full Bench of the 9th of January 1865, Weekly Reporter, Vol. II., page 15. But in the present case there is no mention of a sunnud, and nothing in the Amuldaree Chitta, which is the only document pro-

duced, to show that the tank was allowed to be excavated for a public benefit, or that the right to water granted to the tenants was in the nature of rent reserved to the zemindar. The case is simply one where the husband of the plaintiff granted the defendant's leave to dig a tank for a *bonus;* but there is nothing to show that the tank was a public one for the benefit of the whole village, so as to make the case fall within the Full Bench Ruling referred to. In this state of things, and on the facts found by the Lower Court, the defendant is not in a legal position to resist the undoubted right of the plaintiff to resume lands held under invalid grants or under no grant at all.

There is no necessity for any further enquiry or finding. This Court is fully in a position to say what the legal rights and position of both parties are; and we accordingly reverse the decision of the Principal Sudder Ameen, and restore that of the first Court with costs.

The 3rd August 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Sale of land for arrears of Revenue (Regulation XI., 1822)—Right of enhancement by successors to auction-purchasers—Onus probandi (where defendant admits part of the lands to be mâl, but does not separate the rent-free lands).

Case No. 3288 of 1864.

Special Appeal from a decision passed by Baboo Grish Chunder Ghose, Principal Sudder Ameen of the 24-Pergunnahs, dated the 25th August 1864, reversing a decision passed by Baboo Nurothma Mullick, Sudder Ameen of that District, dated the 13th May 1864.

Rajah Sutto Churn Ghosal (Defendant), *Appellant,*

versus

Mohesh Chunder Mitter (Plaintiff), *Respondent.*

Baboos Kishen Kishore Ghose, Hem Chunder Banerjee, and *Obhoy Churn Bose* for Appellant.

Baboos Banee Madhub Banerjee, Dwarkanath Mitter, and *Oopendar Chunder Bose* for Respondent.

Cases Nos. 936, 937, and 938 of 1865.

Special Appeals from a decision passed by Baboo Koonj Lall Banerjee, Officiating 2nd Principal Sudder Ameen of the 24-Pergunnahs, dated the 12th December 1864, reversing a decision passed by Baboo Nurothma Mullick, Sudder Ameen of that District, dated the 30th June 1864.

Rajah Sutto Churn Ghosal (Defendant), *Appellant,*

versus

Tarinee Churn Ghose (Plaintiff), *Respondent.*

Baboos Kishen Kishore Ghose, Hem Chunder Banerjee, and *Obhoy Churn Bose* for Appellant.

Baboos Banee Madhub Banerjee, Dwarkanath Mitter, and *Opendar Chunder Bose* for Respondent.

In a sale for arrears of revenue under Regulation XI. of 1822, the right of enhancement, though not enforced by the original purchaser, may be revived by his successor, unless the tenant can show clearly that he is protected.

In a suit, not for resumption, but for assessment at enhanced rates, in which the defendant admits that the main portion of the lands in dispute are mâl, but does not separate the rent-free lands, the plaintiff is not bound to prove that the lands are mal until the defendant points out their precise situation.

THESE four appeals all turn on the same points, and they have been argued at considerable length on both sides in appeal No. 936.

The plaintiff is the successor of an auction-purchaser, and he has sued successfully in the Appellate Court to assess at enhanced rates certain lands held by the Rajah defendant.

The pleas for the defence against enhancement were three in number: *1st,* That the lands were protected by a mourossee pottah granted by the Collector in 1190; *2nd,* that part of the lands were rent-free, and that the plaintiff should prove that the defendant had at some time paid rent thereon; *3rd,* that 2 beegahs and 10 cottahs of land were held by the defendant in another estate (Taloo Ram Tanoo) not the property of the plaintiff.

We may at once dismiss the third point raised, by remarking that there is a sufficient finding of fact as to the exact locality of this portion, and that the pleader for the appellant does not press this part of the appeal.

As regards the first point, it is admitted that the terms of the pottah granted by the Collector are not equivalent to a heredi-

tary and fixed grant; and that the Collector had no authority to confer such title. But it is said that the defendant is shown to have been paying at the same rate for a period antecedent to the Decennial Settlement, though not perhaps for 12 years previous to that date, and that he ought to be protected under the late ruling of the Privy Council in Ranee Surno Moyee's case, reported at page 13 of the Weekly Reporter for April, Vol. II., No. 10. It is also much pressed upon us that the predecessors of the plaintiff, and also the original auction-purchaser, had waived their admitted rights of enhancement; and that it is not competent for the plaintiff to revive and put those rights in force now.

We observe that this case differs from that of Ranee Surno Moyee. That was a sale under Regulation XLIV. of 1793; the present case refers to a sale under Regulation XI. of 1822. In Ranee Surno Moyee's case, their Lordships appear to have been guided by the principle that the same rent had been paid for 60 years, and that there was no evidence that, when first imposed, or even when the purchase was made, it was not a perfectly adequate rent for the property. No such plea is or can be advanced in this case. There is no proof or plea that the rent is a proper rent or a rent adequate, according to the rate of the Pergunnah and the locality. The Sale Law, under which the plaintiff became a proprietor, was more stringent than the Sale Law of 1793; and the purchaser had rights of eviction as well as of annulment and enhancement. It is true that no right of eviction and settlement with other parties was ever put in force. But the right to demand rent is an ever-recurring cause of action, as has been held ever since the case of Digumbur Mitter in 1856; and the right to have rent at a proper and, consequently, at an enhanced rate, is one which resides in the zemindar, unless the tenant can bar the action by some effective deed, or can otherwise bind the zemindar. Now, it is found in this case that the pottah is not *istemraree* or *mourosee* in its terms; and this is a case in which the presumption arising out of 20 years' payment at the same rate, by the nature of the action, is not pleaded, and does not arise. The suit, we observe, was brought before Act X. of 1859 came into operation. Neither is the defendant a *khoodkasht* who might be protected under Section 32 of the Sale Law, Regulation XI. of 1822, under which the land came under the plaintiff's zemindary rights.

On the whole, we do not find anything in the decision, or in the arguments advanced by the defendant's pleader, to make us think that the defendant has any legal right to resist enhancement. The decision on the law, as applied to the facts found, appears to us correct.

As regards the second point of the rent-free lands, the decision of the Full Bench of the 1st June 1863, quoted at page 115 of the Special Number of the Weekly Reporter, might be in point, but for one important circumstance. It is found as a fact in all these cases that the defendant would not point out to the Ameen who went to the spot the exact situation of these alleged rent-free lands, so that the plaintiff could not distinguish them from the rest, and could have had no opportunity of proving that he had ever received rent on account of them.

We think, then, that the decision of the Lower Court is in all respect fit for confirmation. On the first point, the right of enhancement, though apparently not enforced by the original purchaser, may be revived at any time by a subsequent proprietor, unless the tenant show clearly that he is protected; and on the second we hold that the plaintiff could not be called on to prove that the lands had been *mál* until the defendant first pointed out their precise situation, seeing that the suit was not one for resumption, but a suit in which the defendant admitted that the main portions were *mál* and did not separate the rent-free lands.

We dismiss the appeals in all four cases with costs.

The 4th August 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Hindoo Law—Women (Right of, to be Adhikaree)—Vyvasthas or local testimony not necessary to prove doctrines of Hindoo Law.

Case No. 1036 of 1865.

Special Appeal from a decision passed by the Judicial Commissioner of Assam, dated the 28th January 1865, reversing a decision passed by the Deputy Commissioner of Gowalparah, dated the 13th December 1864.

Poorun Narain Dutt and others (Plaintiffs), *Appellants*,

versus

Kasheessuree Dossee (Defendant), *Respondent*.

Mr. J. S. Rochfort and *Baboo Mohinee Mohun Roy* for Appellants.

Baboo Onoocool Chunder Mookerjee for Respondent.

A woman who has given *montros* which have been accepted, and was nominated by her deceased husband to the adhikaree, is not prevented by the Hindoo Law from being so.

Vyvasthas need not be called for, nor local testimony relied on, to prove the doctrines of Hindoo Law.

In this case the two points in special appeal are:

1st.—That by the Hindoo Law a woman cannot execute any priestly office: and that, therefore, the Lower Appellate Court has erred in decreeing the defendant's title to be *adhikaree*.

2ndly.—That a *vyvastha* was not called for, nor the evidence of witnesses as to the requisitions of Hindoo Law on this point duly considered.

We may premise on this latter matter that there is no law, precedent, or legal practice requiring *vyvasthas* to be called for, or local testimony to be relied on, to prove the doctrines of Hindoo Law; nor was there any such law of practice when this case was instituted.

As to the first point, we are referred to Sir W. Jones's Translation of Manu, the Calcutta Edition, Chapter IX., Sloke XVIII., and Chapter V., Sloke, page 155. The *dicta* there are in substance that the wife and husband's sacrifices shall be made together; and that, as women are not instructed in the *Veda*, and are simple creatures, they are not fit for priestly duties.

On the other hand, it is clearly found as a fact by the Lower Appellate Court on evidence that the lady in this case gave "*montros*" which were accepted, and that she was nominated by her deceased husband to be *adhikaree*, and apparently no one but defendant has raised the present contention.

It has been held in this Court that a woman can be a *mootwullee*, and that the profits of a *debuttur* can be received by a female. We are not shewn, except by the above texts, which do not cover the point before us, that a woman cannot, under such circumstances as appear in this case, be an *adhikaree*.

We, therefore, dismiss this special appeal with costs.

The 4th August 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges*.

Garrow Mountaineers—Regulation VIII., 1822 (Power of Government to introduce, limited) — Pergunnah Sooshung — Jurisdiction (of Civil Courts.

Case No. 97 of 1865.

Regular Appeal from a decision passed by Capt. B. W. D. Morton, Deputy Commissioner of Gowalparah, dated the 3rd December 1864.

Rajah Rajkissen Sing Surmono Bahadoor (Plaintiff), *Appellant*,

versus

The Collector of Gowalparah, on behalf of Government (Defendant), *Respondent*.

Baboos Onoocool Chunder Mookerjee and *Unnodapershad Banerjee* for Appellant.

Baboo Kishen Kishore Ghose for Respondent.

The Executive Government is not empowered to introduce Regulation VIII., 1822 (removing the Garrow Mountaineers and other rude tribes in a certain tract of Rungpore from the operation of the general Regulations) into any other tract of country than that described in Section 2. Consequently, the Civil Court have jurisdiction to entertain a suit for a declaration of the plaintiff's right to a part of Pergunnah Sooshung, and to question an order of Government directing the portion of the estate in question to be separated from the zemindary and to be managed by special agency.

This was a suit for the declaration of the plaintiff's right to certain hills and villages as part and parcel of Pergunnah Sooshung. The Deputy Commissioner has decided that the Civil Court has no power to entertain the suit or to interfere with an order of the Government directing that the portion of the estate in question should be separated from the zemindary, and should be specially managed by the Deputy Commissioner.

The correctness or otherwise of the decision wholly turns on the interpretation to be given to Section 8, Regulation VIII. of 1822, taken and read carefully by the light of the remainder of the enactment.

The law itself was one for exempting the Garrow Mountaineers and other rude tribes on the North-East Frontier of Rungpore, from the operation of the existing Regulations and for establishing a special system of Government for the tract of country occupied by them, or bordering on their possessions. So far the title and scope of the law is gener

al, and the preamble sets out, at some length, the habits and peculiarities of these wild tribes, the difficulty of dealing with them, and the necessity for substituting for the ordinary administration some special agency fitted to deal with the chiefs, and to prevent feuds between them and the zemindars. The second Section of the law is as follows :—

"The tract of country now comprised in "the Thannah Jurisdiction of Gowalparah, "Debree, and Kurreebarree, in the district of "Rungpore is hereby declared separated from "the said district, and the operation of rules "for the administration of the Police, and of "Civil and Criminal Justice, as well as those "for the collection of Land Revenue, Customs, Abkaree, and Stamp Revenues, together with all other rules contained in the "Regulations printed and published in the "manner prescribed by Regulation XLI. of "1793, are suspended, and shall cease to have "effect therein from the date of the promulgation of this Regulation, except in so far "as may be hereinafter provided." The subsequent sections of the law down to the 7th are occupied with provisions for the duties of a Special Officer or Commissioner to be appointed in the tract "above described," and are told how he is to conduct criminal and civil trials, where the appeals are to lie, and how he is to manage the Police.

Then comes the 8th Section, on which so much turns. By the first part of it, the Special Commissioner is told, in the conduct of the Revenue, Customs, Abkaree, and Stamps, &c., &c., to observe the rules and principles of the general Regulations, and to receive instructions also from the Government, and then, without a break or stop, occur the following words, "provided, however, "that it shall be competent to the Governor-General in Council to direct the separation, temporarily or permanently, of any tract "of country occupied by Garrow mountaineers or other rude tribes, from the "estates of any neighbouring zemindars to "which the same may now claim to be "attached," and the first Clause of the Section ends by laying it down that the collection of cesses by zemindars from the rude tribes may be discontinued, and compensation be allotted to them. The second Clause of the same Section says that "no suit or action shall be entertained by any Civil Court having jurisdiction, or that may hereafter have jurisdiction *within the tract of country* subject to the authority of the *Commissioner*, on account of any act of "the above description done under the au-"thority of the Governor-General."

The 9th and last Section of the law is so far important that it prescribes that, in case of doubts or difficulties, reference is to be made to Government "in all matters con-"nected with the tract of country specified "in Section 2, or with the races of moun-"taineers and rude tribes above described."

Now, the Deputy Commissioner, it is quite clear to us, admits the correctness of the plaintiff's allegation that the lands in the present case are *not* included in the tract of country specially marked out and described in Section 2 as already quoted by us. But he says that this does not matter, and that the whole gist of the "Regulation must be taken into consideration," and he evidently treats Section 8 as if it empowered the Government to apply the provisions of the law for a special agency to any other tract of country besides that described in Section 2.

We entirely concur with the Lower Court in deeming that the "gist of the whole Regulation" is to be looked to; but a careful perusal and comparison of all the Sections lead us to the conclusion that the words laid stress on in Section 8 can only refer to the special tract mentioned in Section 2, and that they can never be understood as vesting the Executive Government with power to introduce the Regulation in any other tract on our North-Eastern frontier, whether situated in Rungpore, Gowalparah, Mymensingh, the Cossiah Hills, or Sylhet.

Every other provision in the law refers to, and must be read with, Section 2. Had the words of Section 8 been intended to vest Government with the power of indefinitely extending the law, they surely would have constituted a separate Section by themselves, and they would never have been inserted in connection with words explanatory of the fiscal duties of the Commissioner to be appointed for a very well-defined tract of country.

The Government pleader argues that the words relied on by the Lower Court must refer to new and different tracts to have any meaning; and that, if they are to be read as applying to the tracts described in Section 2, they are objectless and absurd. But we think it is perfectly easy to give the words a definite scope and meaning, and yet to confine them to the three Thannahs of the Rungpore District. The law, to our thinking, having constituted a Special Commissioner, and having told him how he is to exercise his

fiscal, criminal, civil, and police-powers, next provides for cases in which it may be necessary to take portions of the estates of zemindars within the same tract out of the hands of such zemindars to prevent their levying cesses, and to give them compensation. The words "any tract of country" would then mean any tract within the three Thannahs of the internal division or separation of which the law had, till then, said nothing; and the words "from the estates of any neighbouring zemindars to which the same may now claim to be attached" will be zemindars within the same tract. The law evidently contemplated a state of things in which the boundaries of the zemindaries and the power of the zemindars to collect from the Garrows were ill-defined, and it was deemed by the Legislature, in order to prevent disturbances and bloodshed, that the matter should be taken out of the hands of the ordinary tribunals. But the whole contemplated and defined three particular Thannahs in Rungpore.

This was the view apparently taken, we observe, by the authorities, Revenue and Judicial, in the district of Mymensing, where the cause of action was at first thought to have arisen; and on a very careful perusal of the law, we can come to no other conclusion than that it is not competent to the Executive authorities to extend and enlarge the enactment in the manner claimed. The letter of the Bengal Government, dated the 18th of November 1862, on which the Lower Court also relies, appears to us to have misinterpreted the object and intent of the Legislature, and to have claimed a jurisdiction which, as bound to interpret the law strictly, we are unable to support. We can, therefore, have no hesitation in ruling that the jurisdiction of the Civil Court is not ousted, and that the case should go to trial.

We find, however, that the pleader for the appellant is very anxious that the case should not be tried by the Deputy Commissioner of Gowalparah, who has already, as Collector of that district, returned an answer to the effect that the Civil Courts cannot interfere. The Government pleader does not deny that the same official is vested in that district with Revenue and Civil jurisdiction; and, though the Deputy Commissioner in either capacity has not yet given an opinion on the merits of the case, we think it better for all parties that the case should be tried in the neighbouring district of Mymensing. This we have power to direct under Section 6 of Act VIII. of 1859.

We accordingly annul the decision of the Lower Court, and transmit the case to the Judge of Mymensing, who will try the same on its merits with as little delay as practicable.

Costs to follow the ultimate result.

The 4th August 1865.

Present:

The Hon'ble W. S. Seton-Karr and F. A. Glover, *Judges.*

Assessment of Lakheraj land—Suit by Auction-purchaser—Onus probandi.

Case No. 1155 of 1865.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 31st March 1865, reversing a decision passed by the Additional Principal Sudder Ameen of that District, dated the 23rd June 1864.

Sham Lal Ghose (Plaintiff), *Appellant,*

versus

Sekunder Khan and others (Defendants), *Respondents.*

Mr. C. Gregory and *Baboo Rajendur Misser* for Appellant.

Mr. J. Baptist for Respondents.

In a suit by an auction-purchaser to assess rent on land claimed as valid lakheraj, the *onus* is on the ryot to prove that the land has been held as lakheraj from the year 1790.

THIS was a suit by the zemindar, special appellant before us, to assess rent on certain lands held by the special respondent. The defence was that the land was valid lakheraj, held as such from before the Decennial Settlement.

The Judge applied the rule laid down in this Court's judgment in the case of Kheluch Chunder Ghose, No. 268 of 1864, and remanded the suit with several others to the Court of first instance, in order that the *onus* of proving that the land was *mal* and had paid rent at some time subsequent to the Decennial Settlement, might be laid on the zemindar who sought to resume.

It is urged in special appeal that the plaintiff being an auction-purchaser, this case is exceptional, and that the Full Bench ruling does not apply, and that the *onus* of proving that his land is veritable lakheraj is on the ryot.

We think this objection valid. Section 1, Clause 14, of Act XIV. of 1859, lays it down

auction-purchaser at a Revenue Sale ...ed to resume, unless "it is shewn ...e land has been held lakheraj, or ...ce from the period of the Permanent ...ment." Clearly, therefore, by this Sec... the general rights of the auction-pur...er are admitted, and the *onus* of proving ... special plea, *i. e.*, possession as lakheraj ... the year 1790, must, we think, fall on ... ryot.

A precedent of this Court, dated 31st May ..., Mr. Forbes, respondent, petitioner, ... Shaikh Mean Jan (3 Weekly Reporter, ...), is in point, and we quote the concluding ...graph of that judgment as exactly embo...g our own views of the course to be ...ed by the Lower Appellate Court in the ...nt case. "But this *onus*," say the ...es, speaking of the lakherajdar, "must ... be imposed in a harsh way, such that, after ... long a lapse of time, an honest holder ...not bear it, and *bonâ fide* holdings be un...tly imperilled. It is not necessary that ... ryot should give direct proof of holding ... the exact date of the Permanent Settle...nt; but that he should give such evi...ce of long possession of the character ... repute of his holding and otherwise, ... (after weighing also any evidence on ... other side) the Court may be led to ...eve that the holding is really one of ...ent date—as old as the Permanent Set...ent, and not a modern appropriation." ... reverse the Judge's order of remand, ...irect him to try the appeal himself, ... reference to the remarks above recorded. ... will follow the result.

The 7th August 1865.

Present:

... Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

...o Law—Suit by Mother and Guardian ... Minor reversioner without certificate under ...t XL. of 1858—Alienations by widow—De...atory suit by reversioner.

Case No. 87 of 1865.

...ular Appeal from a decision passed by ... Principal Sudder Ameen of Purneah, ...ted the 28th December 1864.

...y Chand Jha and others (Defendants), *Appellants,*

versus

... Monee Debia (Plaintiff), *Respondent.*

..., *A. F. Lingham* and *Moonshee Ameer Ali* for Appellants.

Baboo Romanath Bose for Respondent.

The mother and guardian of a minor reversioner, being herself a reversioner and of full age, may sue without obtaining a certificate under Act XL. of 1858.

A reversioner may sue, during the widow's lifetime, to obtain a declaration that a conveyance made by the widow is invalid as made without legal necessity, and therefore not binding beyond the widow's life.

THIS was a suit on the part of the reversioners to obtain a declaration that certain alienations by a Hindoo widow be set aside as invalid under the Hindoo Law.

The Principal Sudder Ameen has held that the alienations were not justified under any legal necessity. He declared them to be binding only during the widow's lifetime.

In appeal it is contended,

First.—That the suit will not lie, inasmuch as the plaintiff sues in her capacity of guardian of a minor reversioner without having previously obtained a certificate under the provisions of Act XL. of 1858.

Secondly.—That the suit is premature, inasmuch as no title is vested in the plaintiff until the death of the widow.

Thirdly.—That the alienations were made for purposes allowable under the Hindoo Law.

On the *first* point, we are of opinion that the suit will lie; the plaintiff sues "*sui juris*," and as mother and guardian of the minor. The plaintiff herself being a reversioner and of full age, the suit is in due form.

On the *second* point, we are clearly of opinion that the suit is not premature. The act of the widow may not be such an act of waste as to destroy her estate, and to vest it immediately in the reversionary heirs. Yet the conveyance will be binding only during the widow's life; and a suit during her lifetime to declare that the conveyance is invalid, inasmuch as it was made without legal necessity, and is, therefore, not binding beyond the widow's life, will lie. (*See* Decision of a Full Bench of this Court, 7th April 1864, Gobind Monee Dossee, plaintiff, appellant, *versus* Sham Lal Bysakh and others, defendants.)

On the *third* and *last* point, which, we may observe, was not pressed upon us by the pleader for the appellants, after considering the evidence and circumstances of the case, we see no reason to differ from the Principal Sudder Ameen.

The appeal is dismissed with costs bearing interest, for which the appellants are liable.

The 7th August 1865.

Present:

The Hon'ble G. Campbell and F. A. Glover, *Judges.*

Limitation—Suits by Minors after attaining majority.

Case No. 257 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 17th November 1864, reversing a decision passed by the Moonsiff of Kottulpore, dated the 21st March 1863.

Khetter Mohun Ghose and others (Defendants), *Appellants,*

versus

Ramessur Ghose and others (Plaintiffs), *Respondents.*

Baboos Baneenath Bose and *Romanath Bose* for Appellants.

Baboos Juggadanund Mookerjee and *Roopnath Banerjee* for Respondents.

Concerning the limitation applicable to suits by minors after attaining majority.

THIS case was remanded by the High Court on the 26th June 1864, with a direction to try properly the plea of minority set up by the plaintiff to bring his suit within time.

The Principal Sudder Ameen has now decided that the plaintiff, who is the special respondent before us, brought his suit within 12 years after attaining majority, and that therefore his suit was not barred.

It is urged in special appeal that the suit is barred, more than three years from the date of special respondent's majority having elapsed before it was instituted.

This point was not taken when the case was originally before the Court in special appeal. A reference to the old record shews that the only objection then was that the Principal Sudder Ameen had erred in his calculation *quoad* the special respondent's time of attaining majority, and that there was no proof that he had brought his suit within 12 years from that date.

Under the circumstances, however, and considering that the objection is one patent on the face of the plaint, and involves, moreover, a question of jurisdiction, we think that it may be determined now, the former laches notwithstanding.

The sale sought to be cancelled was made in 1844. Special respondent attained majority, as is found by the Principal Sudder Ameen on evidence, at the end of 1853, and this suit was instituted on the 18th of June 1862.

Act XIV. of 1859 came into operation on the 1st of January 1862, and this suit is therefore governed by it. Section 11 of that Act lays it down that, when a right of action first accrues to a person who is then under a legal disability (such as a minor for instance), the action may be brought by such person within the same time after the disability shall have ceased, as would otherwise have been allowed from the time when the cause of action accrued, unless such time shall exceed the period of three years, in which case the suit shall be commenced within three years from the time the disability ceased.

Clearly, therefore, this action should have been brought within three years after the end of the year 1853, and, not having been brought till the 18th June 1862, is barred by limitation.

We, therefore, reverse the Principal Sudder Ameen's order, and dismiss the suit. Under the circumstances, each party will pay their own costs in all Courts.

The 7th August 1865.

Present:

The Hon'ble C. Steer and J. B. Phear, *Judges.*

Mortgage—Deposit in Court (when unconditional and valid)—Notice of deposit to Mortgagee—Interest.

Special Appeals from decisions passed by Moulvie Itrut Hossein, Principal Sudder Ameen of Sarun, dated the 17th January 1865, reversing decisions of Baboo Luchmun Pershad, Moonsiff of Pursa, dated the 7th September 1864.

Case No. 999 of 1865.

Hethan Singh (Plaintiff), *Appellant,*

versus

Nurkoo Singh and others (Defendants), *Respondents.*

Baboos Debendur Narain Bose and *Kishen Succa Mookerjee* for Appellant.

No one for Respondents.

Case No. 1000 of 1865.

Hethan Singh (one of the Defendants), *Appellant,*

versus

Lokraj Singh and others (Plaintiffs), *Respondents.*

Babu Debendro Narain Bose for Appellant.

Babu Kali Kishen Sein for Respondents.

A deposit of the mortgage-money by a mortgagor, accompanied by a protest against the validity of the mortgage itself, and a threat to sue for its cancelment, imposes no condition upon the acceptance of the money so as to render the tender invalid.

A deposit b ing once duly made, the mortgagor's equity of redemption is saved quite irrespective of whether the mortgagee has received notice of the deposit or not.

Quære—Whether, if the mortgagee's delay in taking the money out of Court is due to the negligence of the mortgagor in not doing his best towards ensuring prompt notice of the deposit being given to the mortgagee, the latter is entitled to hold the deed against the accruing interest.

THESE two special appeals are so related to each other as to be almost necessarily determined by one and the same judgment.

The original suits in both cases were brought to obtain possession of the same land belonging to Nurkoo Sing and others, each plaintiff alleging that it had been mortgaged to himself and foreclosed. The alleged mortgagor makes no substantial resistance in either case, so that the two suits practically resolve themselves into a contest between the two mortgagees.

Lokraj Sing is the mortgagee who sues in the original suit of No. 1000, and Hethan Sing the like in that of No. 999.

Lokraj's mortgage is alleged to have been made on the 5th February 1861, while the date of Hethan's is 18th August of the same year.

The Lower Appellate Court had, in effect, held that Lokraj's mortgage has been duly foreclosed, and, therefore, that Hethan, whose mortgage was posterior to that of Lokraj, had necessarily lost the subject of his mortgage.

It appears that in Lokraj's case the mortgagor did, within the statutable year of grace which followed Lokraj's petition for foreclosure, deposit in Court (where the money still remains) the full amount of principal monies and interest alleged to be due on the mortgage; but he accompanied the deposit with a protest against the validity of the mortgage itself, and expressed his intention to sue for its cancelment. Also, neither the mortgagor nor the Court, at any time, gave notice to the mortgagee that the money had been so deposited in Court.

The Lower Appellate Court says: "As the "mortgagor, in repudiation of the mortgage, "has deposited the mortgage-money in order "to redeem the property, but has stated in "his petition that he will subsequently sue "for the cancelment of the alleged deed of "mortgage of the plaintiff, the inference "drawn from this statement seems to be that "the mortgagor will take back the money "deposited by him by means of a regular "suit, inasmuch as the declaration made for "the cancelment of the Bill of Sale is tanta-"mount to a declaration for taking back the "consideration-money. Therefore, under the "decision of the Sudder Court, dated the "30th December 1848, in the case of Kishore "Roy and others *versus* Wazeer Ali and "others, such deposit of the mortgage-money "by the mortgagor cannot be considered to "be tantamount to a deposit made within "the prescribed time fixed by the notice." Against this conclusion of law, Hethan Sing now specially appeals.

The enactment which enables a mortgagor, by depositing money in Court after proceedings for foreclosure have been commenced against him, to prevent those proceedings from ripening by mere lapse of time into final foreclosure, is the 7th Section of Regulation XVII. of 1806, which also declares that such deposit shall be made "as allowed for "the security of the borrower and the mort-"gagor, by Section 2, Regulation I. of 1798, "and Section 12, Regulation XXXIV. of 1803." This latter Section is nothing more than a repetition of Section 2, Regulation I. of 1798; and, on turning to this, we find the words bearing on this point to be as follow:—

"The borrower who may be desirous to "redeem his land by the payment of the "money lent upon it, with interest due there-"on, within the stipulated period, is at liberty, "on or before the date stipulated, either to "tender and pay to the lender the amount "due to him, taking such precautions as he "may think necessary to establish such ten-"der and payment, if evaded or denied, or "without any tender to the lender to deposit "the amount due to him on or before the "stipulated date in the Dewanny Adawlut "of the City or Zillah in which the land "may be situated." The Section goes on to say: "The Judge shall cause a written notice "of such deposit to be delivered to the lend-"er, and, on the application of the latter, "and his surrender of the conditional Bill of "Sale, or showing satisfactory cause why it "cannot be surrendered, shall pay him the "amount deposited, and take his acknowledg-"ment to remain among the records of the "Court." It is obvious to us that these provisions were framed solely with a view to

the protection of the borrower and mortgagor as, indeed, is declared by the words which we have quoted from Section 7 of Regulation XVII. of 1806; and we think the effect of them is to constitute the Judge *agent* of the lender or mortgagee in the sense of making the deposit with him a tender to lender or mortgagee, and at the same time to make him agent of the borrower or mortgagor for the purpose of receiving back the conditional Bill of Sale or other security. In this view the deposit to be good must possess that character which is necessary to make a tender good in law, *viz.*, as it is usually termed in legal phraseology, it must be "unconditional." Now, "unconditional," as used here, merely means that the tender must not be made in such a way as that its acceptance would impliedly impose a condition upon the creditor. That this is its meaning in the English authorities, is abundantly clear. For instance, if the tender cannot be accepted without supplying evidence of an admission that no more is due, then it is "conditional" and bad (*see* Bowen *versus* Owen, 11 Q. B., p. 130). But a tender accompanied by a protest that the money is not due, as it binds the creditor to nothing, is a good tender (Maining *versus* Lunn, 2 C. and K.). We think that the Indian authorities are entirely to the same effect. In the case relied upon by the Lower Appellate Court, Kishore Roy *versus* Wozeer Ali, decided by the late Sudder on the 30th December 1848, the suit was one brought by the mortgagor to recover the money deposited by him in Court; and consequently the decision has no bearing on the matter before us.

In other cases. the late Sudder Court has held that a deposit in Court, coupled with the condition that the Judge should not pay the money to the mortgagee until after the lapse of a certain specified period, is not a compliance with the Regulation, and it is manifest that it is not so, because a deposit made in this way does not amount to a tender at all. It is of the very essence of a tender that the person to whom the money is offered should have the option of taking the money at once. But in these cases no question as to conditionality fell to be decided.

In Prannath Roy Chowdry *versus* Rookie Begum and others, 7 Moore's Indian Appeals, p. 352, Lord Kingsdown, in delivering judgment, certainly used words which would at first sight seem to countenance the view of the Lower Appellate Court in this case. But, on closer consideration, it appears that his Lordship was speaking throughout with special reference to the peculiar facts of that case. It was there one of the main issues, whether or not the person who made the deposit into Court really represented the mortgagor, and this circumstance must have been prominent in the learned Judge's mind when he wrote the words: "The mortgagee "would have little inducement to take the "money *waiving his lien* by its acceptance if "litigation on the very same subject were "to re-commence upon his acceptance of the "money. His Lordship could hardly have made the contrast between possession of the lien and possession or the money in respect of which the lien subsisted, except in view of some contest in reference to the ownerships of the subject of lien and money respectively. But the substantial ground upon which that judgment was based is further on thus stated by Lord Kingsdown himself: "Had the mortgagee accepted the money, "he would have admitted a title to redeem "in which he was not bound to acquiesce." And, that being so, the tender was conditional in the sense of imposing a condition upon the mortgagee who should accept it. And thus we conceive that none of the decisions to which we have been referred go beyond the limits of the English doctrine relative to the circumstances which will render a tender invalid; on the contrary, we think that that doctrine is completely adopted and carried into operation.

In the case before us, the protest, or perhaps threat, of the mortgagor, to the effect that he should take legal measures for procuring the cancelment of the mortgage, imposed no condition upon the acceptance of the money. The mortgagee could take out the money at once unshackled by any restriction or admission in his own part. We are, therefore, of opinion that the Lower Appellate Court committed an error in law in holding that the deposit was bad for the first reason alleged.

Neither do we think that the second reason is valid. The Regulation makes it the *duty of the Court* to send notice of the deposit to the mortgagee. Very possibly the Court would be entitled to refuse to receive the deposit, unless it were accompanied by a sufficient sum of money, in the shape of Court-fees, to cover the expense which it would be forced to incur in sending notice to the mortgagee. But the due deposit having been once made, even though the Court-fees have not been paid, we are

of opinion that the mortgagor's equity of redemption is saved, quite irrespective of whether the mortgagee has received notice of the deposit or not. The words of the Regulation are "a deposit made as above "required shall be considered to preserve to "the borrower his full right of redemption." Of course, the mortgagor will not get back his mortgage-deed until the mortgagee has taken the money out of Court, and it may be that, if his delay in doing this be due to the negligence of the mortgagor in not doing his best towards ensuring prompt notice of the deposit being given to the mortgagee, the latter may be entitled, on the equity of the Regulation, to hold the deed against the accruing interest. But this question we are not now called upon to decide. Both Courts below find, as a fact, that the amount of the principal and interest was deposited in the Zillah Court before the expiration of the year of grace, and consequently the mortgagor's full right of redemption was saved.

Therefore, the appeal in No. 1000 of 1865 must be allowed with costs, and the decision of the Court of first instance affirmed.

As regards special appeal No. 999 of 1865, the conclusion to which the Lower Appellate Court arrived in No. 1000 rendered a decision as to the merits unnecessary. Our present decision, therefore, brings the issue as to those merits into life again; however, the respondents have not raised any matter of cross-appeal, and do not ask to have those issues sent back to the Lower Appellate Court for trial. We must, therefore, assume that they cannot dispute the justice of the first Court's decision with regard to them. We accordingly uphold the appeal with costs, affirming the decree of the Court of first instance.

The 7th August 1865.

Present:

The Hon'ble G. Loch and F. A. Glover,

Judges.

Mahomedan Law—Presumption of Marriage—Acknowledgment of paternity—Onus probandi.

Case No. 85 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 31st December 1864.

Rook Begum (Defendant),
Appellant,
versus
Shahzadah Walagowhur Shah (Plaintiff),
Respondent.

Messrs. J. T. Woodroffe and *C. Gregory* and *Moulvie Murhamut Hossein* for Appellant.

Messrs. G. C. Paul and *R. E. Twidale* for Respondent.

Suit laid at rupees 43,275-5 as. 9 gds.

According to the Mahomedan Law a public acknowledgment of paternity will of itself raise a presumption of marriage between the person who makes it, and the mother of the child, without the father specifically connecting his paternity with any particular woman. To rebut this presumption, the *onus* of proving the impossibility of the marriage is on the other side.

THIS was a suit on behalf of one Musst. Noorunnissa Begum, claiming, as daughter and one of the heirs of Shahzadah Mahomed Kykobad, a certain share of the real and personal property left by him. Noorunnissa Begum being under age, the suit was instituted by her husband, Shahzadah Gowhur Shah, and laid at rupees 49,418-3-8-2-0-2.

The defence on the part of Shah Rook Begum, widow of the deceased Kykobad, and her daughter, Hameedoonnissa, was that the plaintiff was an illegitimate child by one of the deceased Prince's concubines, and, therefore, not entitled to succeed to any part of her father's property. It was added, further, that, of the landed estate, 14 beegahs 8 cottahs of Kherajee land, together with 11 cottahs of rent-free land, had, together with the houses, &c., thereon, been conveyed to Shah Rook Begum on the 9th of July 1853, in lieu of her dower claim amounting to 25,000 rupees; but that the residue, amounting to 21 beegahs, had been purchased by the said Shah Rook Begum from her husband for the sum of rupees 3,000 on the 4th of November 1853.

With regard to the personalty, the allegation was that all of it was expended in the Shahzadah's funeral expenses, and in paying his debts.

On these pleadings, the Principal Sudder Ameen found—*first*, that the plaintiff was one of her father's legal heirs, Mirza Kykobad having in his life-time distinctly admitted his paternity; *secondly*, that the deeds of conveyance from Kykobad to his wife, Shah Rook Begum, were false; and, *thirdly*, that plaintiff could only claim her share of what would have been receivable by her father had he lived from the estate of his father,

Shahzadah Yasin. On this issue Noorunnissa obtained the sum of rupees 365-10.

The *first* and *second* only of these points were contested before us in appeal, and we shall, therefore, confine our attention to them.

With regard to the allegation of marriage between Mirza Kykobad and Ashrufoonissa, the mother of the respondent, Mr. Woodroffe for the appellant contended that there was not the slightest reliable proof of the fact; that the witnesses were men of low *status;* and that their evidence was discrepant and contradictory. He further argued that the bare fact of a man's acknowledging a child to be his own, without connecting the allegation with some woman as the mother of the child, is not sufficient by Mahomedan Law to raise the presumption of legitimacy. He added that the evidence of members of the Mysore family, and, above all, the omission of Ashrufoonissa's name from the list of the wives and children of the Princes furnished to the Superintendent, proved most clearly that the above-named lady was not Kykobad's wife.

We may, we think, concede thus far, that the direct evidence of the marriage is weak. The witnesses are, for the most part, men of no character or respectability, and no report of the marriage was made, as was usual, to the Superintendent. All marriages of the members of the Mysore family were, by order of Government, reported to the officer in charge, and this order was not relaxed till the year 1860. But, admitting all this, as also the omission of Ashrufoonissa's name from the list above mentioned, the fact of Kykobad having distinctly and publicly acknowledged Noorunnissa as his daughter, and that not on one occasion only, is, we think, sufficient, according to the principles of Mahomedan Law, to raise the presumption that he was married to the mother. Mr. Baillie, in his work on the Mahomedan Law of Inheritance, quotes from the "Jowhurrutoon-Nuyyerah" the following dictum: "When the preceding conditions concur in "an acknowledgment of parentage, the per-"son acknowledged becomes an heir of the "acknowledger, and is entitled to a full par-"ticipation in his inheritance, with the other "heirs of the same description" (page 41). These conditions are elsewhere stated to be the possibility of the parties standing to each other in the relation of parent and child, the unknown descent of the person acknowledged, and the ascent of such person to the fact of his being the acknowledger's child. In other words, where there is a clear and open declaration of paternity, the *onus* of showing that marriage was impossible is on the other side. This view of the law has been very distinctly laid down in a decision of this Court, dated 29th April 1863, Musst. Nanaboonissa and others *versus* Musst. Fuzuloonissa and others (1 Marshall, p. 428), and the ruling has been followed in several analogous cases since (2 Weekly Reporter, p. 52, and 1 W. R., p. 16).

In the former case, the Judges say as follows: "When a man has openly and for "a long course of time lived with a woman, "as a man lives with his wife, and has habi-"tually and openly treated the children as "his children before the world, *or*, when he "has publicly and advisedly said of a boy "begotten by himself 'this is my son,' then "the presumption takes its fullest effect. In "that case, we think that the law not only "raises a presumption of marriage, but in "practice prohibits any counter-proof short "of establishing a legal impossibility. In "such a case, we may not really believe that "there was an actual celebration of marriage; "we may have little doubt that there was "nothing of the kind; but still marriage is "legally possible, and it must be presumed, "not so much by presumption of fact as by "presumption of law."

Our attention has been drawn to two decisions of the Privy Council, reported in Moore's Indian Appeals, Volume III., p. 295, and Volume VIII., p. 136, as supporting the appellant's case; but neither of them, in our opinion, affects the question now before us. In the *first*, their Lordships did not go into the point as to whether there had been a direct acknowledgment of paternity, holding "that there was a consecutive course of "treatment, both of the mother and the child, "for a period of between seven and eight "years, under circumstances in which it ap-"peared next to impossible that such a mode "of treatment would have been continued, "except from the presumption of cohabita-"tion, and of the son being the issue of Fyz "Ali Khan."

This decision, therefore, did not proceed on the acknowledgment of paternity by the father, Fyz Ali Khan, but upon another general principle of Mahomedan Law, that marriage may be presumed from continued cohabitation. This law, in its anxiety to ignore an offence which subjected the guilty party to very severe, in some cases to capital, punishment, presumes everything in favor of legitimacy, and, as stated by Macnaghten (Mahomedan Law, p. 23, Vol. IV.), "None but

children, who are in the strictest sense of the word spurious (that is, whose illegitimacy can be proved), are considered incapable of inheriting the estate of their putative father."

In the *second* case decided by the Privy Council, the claim to legitimacy was, no doubt, disallowed; but it was so because there was an absence of such evidence and circumstances as were sufficient to found a presumption. Their Lordships did not in any way deny the principle of Mahomedan Law; indeed, the concluding words of their judgment prove clearly that, had there been any evidence in the case, they would have allowed the presumption. They say: "In arriving at this "conclusion, we wish to be clearly under-"stood as not denying or questioning the "position that, according to Mahomedan Law, "the legitimacy or legitimation of a child of "Mahomedan parents may properly be pre-"sumed or inferred from circumstances with-"out proof, or, at least, without any direct "proof, either of a marriage between the "parents or any formal act of legitimation."

These precedents, therefore, manifestly do not help the appellant's case. On the contrary, they uphold in all its strictness the principle of Mahomedan Law that marriage is in almost all cases presumed, and that it is for the parties impugning it to prove its impossibility.

We are not disposed to lay much stress on the omission of Ashrufoonissa's name from the list furnished to the Superintendent of the Mysore Princes, inasmuch as the omission appears to us perfectly explicable. Ashrufoonissa was confessedly not a wife of the superior class, but a *Khawas;* and by the order of Government, contained in a letter to the Superintendent, and dated 17th July 1836, such women were declared not entitled to pension, although their children were allowed to participate. There was nothing extraordinary, therefore, in Kykobad's omitting Ashrufoonissa's name, and in putting in that of Noorunnissa, inasmuch as the list was filed, not for the purposes of proving legitimacy, or right to inheritance, but to enable Government to apportion the stipends allotted to the Mysore family; and as, by the Government order above quoted, Ashrufoonissa was not entitled to any portion of the stipend, whilst Noorunnissa was so entitled, the omission of the name of the former was a matter of necessity, and tells nothing against the legitimacy of the latter.

The other objection to the validity of the marriage, that it was not reported, as it ought to have been, to the Superintendent, is, we think, untenable. Doubtless, the rule was that such marriage should be reported; but we find it disobeyed in more than one instance, when there was no doubt of the genuineness of the marriage. Prince Fuez, for instance, did not report his marriage till some years after the event, and the present head of the family, Prince Golam Mahomed, did not report his at all.

Taking all these circumstances into consideration, we see nothing in this case that should take it out of the ordinary category; and in concurrence with the former rulings of Divisional Benches of this Court quoted above, and with the principles laid down in the decisions of the Privy Council, we think it an established maxim of Mahomedan Law that a public acknowledgment of paternity will, of itself, raise the presumption of marriage between the acknowledger and the mother of the child without the father specifically connecting his paternity with any particular woman; and that, to rebut this presumption, the absolute impossibility of such marriage will have to be proved. On this question, therefore, we agree with the Principal Sudder Ameen.

We proceed next to consider the genuineness of the conveyances set up by the appellant; and *first* as to the hibbanamah.

Its genuineness is challenged on the ground (1) that the witnesses to its execution are people of no character or respectability; (2) that it was not registered in the Register's Office; and (3) that the hibbanamah, or deed of dower, in lieu of which the hibba-bil-ewuz is said to have been given, has not been produced; and that there is no proof either that the amount of dower was 25,000 rupees, or that any part of the dower was due.

With regard to the first objection, we observe that, of the witnesses who depose to having been present when Kykobad executed the hibbanamah, one at least was a person of respectability and position, being a member of the Mysore family itself; whilst of the others, Rohimooddeen, a man of importance, and a personal friend of the deceased, although he was not present when the deed was given, deposes that he had often heard Kykobad speak of it, and that he was informed of all the particulars of the case by the deceased Mirza.

The hibbanamah was not registered in the Office of the Register of Deeds, no doubt; but we find from the record that directly it was executed, Kykobad wrote to the Superintend-

ent, stating that he had made over such and such property to his wife in lieu of dower, and requesting that the deed might be registered in his office. This was done, as appears from the Superintendent's reply; so that it is clear that directly the conveyance was executed, public intimation was given of the fact; public, that is, so far as the Mysore family was concerned, any member of which could have informed himself of what had taken place should he have chosen to do so.

That the kabinnamah itself has not been produced does not appear to us a matter of suspicion. The amount due on it being paid, the document would have been (as stated in the evidence) handed over to the husband, and the most natural course for him was to destroy it. He had given an equivalent for the dower, and the document was useless. As to there being no proof that the amount of dower was 25,000 rupees, we observe in the first place that the sum was not excessive for people in the respondent's position; and, moreover, as Kykobad's marriage with Shah Rook Begum was a public one, solemnized with the permission of Government, it would have been easy for the respondent to produce evidence as to what was the nature and amount of the dower. The arrangements made on this head are publicly stated at the time of marriage; and, if the sum fixed was not 25,000 rupees, many members of the family could have been produced to confute the appellant's statement. The same remarks apply to the objection that nothing might have been due as dower. It was for the respondent to show that the dower was of the kind called "prompt," and paid at the time of marriage, or deferred and paid at some time afterwards.

The respondents have in no way rebutted the evidence given in support of the hibbanamah, and there appears to us nothing incredible or even unusual in the circumstance that Kykobad should have given such a deed. It is by no means uncommon for Mahomedans of good position to make over lands in lieu of dower-money, which they find themselves unable to pay in cash, and, in the present case, Shah Rook Begum had probably a reason for wishing to realize. She had come to mature age, and saw her husband deserting her for a newly married wife. It was but natural, therefore, that she should wish to recover what was due to her as dower, whilst there remained any property from which to realize. We put aside all considerations of love and affection between the parties, which the respondent's Counsel has endeavoured to show did not and could not exist, and look upon the matter as one of simple bargain. Shah Rook Begum had a claim to 25,000 rupees for dower, and, as her husband could not pay in cash, she took the value in kind.

Then, as to the kobalah, or deed of sale, said to have been executed by Kykobad to his wife Shah Rook Begum for the consideration of 3,000 rupees.

We are not satisfied as to the genuineness of this sale. The two witnesses who depose to it are men of no position or character, and their evidence is given in a suspicious manner. One of them, Sufdar Ali, deposes that he himself wrote the kobalah in the Persian character; the other, Modoosoodun Mitter, swears that it was written by Dilaur Hossein, and adds afterwards, speaking of the kobalah, "the deed was interpreted "to all in Hindee, because Hamidoonissa "was ignorant of Bengalee." It is tolerably evident from this, that one or the other of these witnesses is speaking falsely. Another of the witnesses to the kobalah is said to have been the vendor's daughter Hamidoonissa. The name certainly appears in the document, but no one saw her sign it, and it is, we observe, a circumstance in the highest decree unusual for a *purdanishin* lady to be a subscribing witness to a document.

Again, the kobalah was not registered in the proper office. There is some considerable doubt as to whether it was ever registered at all even by the Kazee; and that official was not examined to clear up the point. But in any case, as the Register's Office was close at hand, there was no reason for applying to the Kazee at all.

But our principal reason for discrediting the kobalah is the inadequate price for which the property is alleged to have been sold. There were three houses, besides a considerable quantity of land. Two of these houses were habitable, and were rented by third parties at 120 rupees a month, so that, allowing nothing as the value of the land and remaining house, the price paid, little, if at all, exceeded two years' rental, and this, too, for land situate in the populous suburb of Kidderpore. If Kykobad's reasons for selling were, as is said, his indebtedness, he would have disposed of his property to better advantage, and would hardly have taken 3,000 rupees for what was worth 30,000 rupees, and, if he were not in difficulties, there was no conceivable reason for his

divesting himself of all his remaining property at a time when he had every prospect of many years of life before him. Nor can it be explained why Kykobad should have thus prospectively shut out his daughter Noorunnissa from her share of his property.

With regard to the personalty, the objection, although taken in the grounds of appeal, was not argued by either side, and the Principal Sudder Ameen's order regarding it will stand.

In respect of the land covered by the hibbanamah, it is reversed. The appellant will retain that property in lieu of her dower.

Our order will be, therefore, that the respondent will be declared, as one of the heirs of her father, entitled to a share in the 21 beegahs of land situate in Kidderpore, covered by the appellant's kobalah, and to rupees 365-10, her share of the personalty. And her suit will be dismissed, and the Principal Sudder Ameen's order reversed, as regards the 14 beegahs 11 cottahs covered by the hibbanamah.

The costs of both Courts will be calculated in proportion to the amounts decreed and dismissed.

The 8th August 1865.

Present :

The Hon'ble C. Steer and J. B. Phear, *Judges.*

Remand—Party submitting to a, not at liberty afterwards to object to the legality of it.

Case No. 1087 of 1865.

Special Appeal from a decision passed by the Judge of Dacca, dated the 26th January 1865, affirming a decision passed by the Principal Sudder Ameen of Furreedpore, dated the 29th April 1864.

Gholam Murteja Chowdhry (Plaintiff), *Appellant.*

versus

Goluck Chunder Roy and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Lulleet Chunder Sein for Respondents.

A party, who submits without resistance to the taking of any material step in legal proceedings (*e. g.*, a remand), cannot afterwards be allowed to complain of the legality of the step as an integral part of the proceedings.

It is admitted that these two cases share the same fate.

There had originally been a remand by the Lower Appellate Court, and the first Court, on the re-hearing which ensued, dismissed the plaintiff's case on both the issues before it: namely, the *first* as to limitation of period of suit, and the *second* as to title. On appeal the Lower Appellate Court affirmed this decision.

On the special appeal now brought by the plaintiff to this Court, it is objected, first, that the remand was illegal. We think that it is now too late for the special appellant to take this objection. He should have done so before consenting to go down on remand. When a party submits, without making all the resistance in his power, to the taking of any material step in proceedings, he cannot afterwards be heard to complain of the legality of the step as an integral part of the proceedings.

The other objections merely went to the Judge's finding on the evidence, and do not constitute matter of special appeal.

Both appeals are dismissed with costs.

The 9th August 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Review of Judgment—Correction of error in admitting second Applications for.

Case No. 2469 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 29th June 1864, affirming a decision passed by the Moonsiff of that District, dated the 29th May 1862.

Nund Lal Podder (Defendant), *Appellant,*

versus

Debnath Chowdhry (Plaintiff), *Respondent.*

Baboo Kalee Kissen Sein for Appellant.

Baboo Bungsheedhur Sein for Respondent.

A Court, when it discovers its mistake in having admitted a second application for a review of judgment, may rectify the mistake by rejecting the second application.

The Principal Sudder Ameen has held that his order, admitting the second application for review, was wrong, and based upon a mistake.

This suit was decreed by the Court of first instance; on appeal this decree was confirmed, and the appeal dismissed. An application for review was made, and the case was re-heard, the result being that the review was rejected, and the former decision, dismissing the appeal, adhered to. A second application for review could not be entertained, and the Principal Sudder Ameen, on discovering his mistake, was quite right in rectifying it by rejecting the second application. If reviews can be admitted in this manner, the Court cannot see where such a system is to end.

The 9th August 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Judgment in rem—Mokurruree pottah set aside on the suit of two shareholders, is void as against all.

Case No. 268 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 23rd November 1864, reversing a decision passed by the Moonsiff of that District, dated the 4th June 1864.

Khoka Koonwur (Plaintiff), *Appellant,*

versus

Jugoo and others (Defendants). *Respondents.*

Baboo Roopnath Banerjee for Appellant.

Mr. A. F. Lingham for Respondents.

An alleged mokurruree pottah, having been set aside by a judgment *in rem* in a case between the shareholders of the plaintiff and the defendant, was held to be for ever inoperative against the plaintiff also, although the plaintiff's suit was barred by limitation.

THREE parties claim a property in regard to which defendants set up possession under a mokurruree pottah. The possession of the defendant was maintained by the Criminal Court. Within three years two of the three claimants brought a suit to obtain possession of their property, and to set aside the alleged mokurruree pottah. They obtained a decree, and the pottah was set aside. Subsequently, the third shareholder brought the present action, to which it is pleaded that he is out of time, whether under the three years' term of Clause 7, or the general six years' term of Clause 16, Section 1, Act XIV. of 1859. The Principal Sudder Ameen dismissed the suit under Clause 7. There is no doubt that he is [illegible] far right, and that defendant's possess[illegible] must be maintained. But plaintiff furt[illegible] urges that he should have a decree to [illegible] aside the pottah, thus enabling him to [illegible] hance the rent without disturbing posses[illegible] A suit of this kind would be barred [illegible] six years' limitation; but we think that, [illegible] document having been set aside by a [illegible] ment as it were *in rem* in a case bet[illegible] the shareholders of the plaintiff and [illegible] defendant, it is for ever inoperative ag[illegible] the plaintiff also. We, therefore, di[illegible] the appeal on the main point; but, [illegible] the circumstances, direct that in this [illegible] tion each party shall pay their own co[illegible] all the Courts, and the decree of the C[illegible] below is so far modified.

The 9th August 1865.

Present:

The Hon'ble C. B. Trevor and G. Cam[illegible] *Judges.*

Judgment (of Appellate Court).

Case No. 264 of 1865.

Special Appeal from a decision passed by [illegible] Judge of West Burdwan, dated the [illegible] December 1864, affirming a decision [illegible] by the Principal Sudder Ameen [illegible] District, dated the 9th December 18[illegible]

Bhagbut Khan (Defendant), *Appella[illegible]*

versus

Puddo Bewa, Pauper (Plaintiff), *Respondent.*

Baboo Nil Madhub Sein for Appella[illegible]

Baboo Sreenath Banerjee for Respond[illegible]

The judgment of an Appellate Court should [illegible] and fully dispose of all the points in issue betw[illegible] parties by a distinct finding on each of them.

ONE Puddo Monee, the widow of [illegible] Soondur, who had two brothers, Byd[illegible] and Nobin Chunder, sues the defend[illegible] Bhagbut Khan, for her husband's shar[illegible] the ancestral property, of which the defe[illegible] ant has managed to obtain possession [illegible] execution of a decree against Nobin Chu[illegible] and Nuffer, one of the sons of Bydnath.

The defendant denies the plaintiff's [illegible] and alleges that the share of the pro[illegible] claimed by plaintiff belonged to his de[illegible] Nobin Chunder, by purchase from the pl[illegible] iff's husband Ram Soondur.

The first Court gave plaintiff a decree, d the Judge on appeal confirmed the same, ply remarking that "the decision which eems to me an excellent one is confirmed ith costs and interests against the appel- nt."

We think the defendant, special appellant, ite justified in contending before us that judgment is no judgment at all; that ains no guarantee that the Judge con- d the fact of the case and the conten- f the parties. The case will be remit- o the present Judge, with directions that early and at length take up the several s in issue between the parties, and come distinct finding on each and every one em.

The 9th August 1865.

Present:

e Hon'ble C. Steer and J. B. Phear, *Judges.*

o Law—Right of giving away daughter in marriage.

Case No. 1090 of 1865.

ial Appeal from a decision passed the Judge of East Burdwan, dated 28th December 1864, reversing a deci- passed by the Moonsiff of that Dis- , dated the 19th September 1864.

ee Gopee Ghose (Plaintiff), *Appellant,*

versus

essur Ghose and others (Defendants), *Respondents.*

oo Mohendur Lall Seal for Appellant.

oo Dwarkanath Sein for Respondents.

gh, by the Hindoo Law, no one but the father, he is alive, can give his daughter in marriage, yet ther can delegate his authority to another. Such tion was presumed in this case from the father g given his daughter, when an infant, to another; r with him till the proper time arrived when a hus- ought to have been provided for her; allowed the iff to marry her; and done nothing to impeach or the validity of the marriage for four years.

HE plaintiff Golamee alleges that, when defendant Juggessur lost his wife, Ku- boni, his daughter, was two years old; he at that time made her over to Ram nder to adopt, and that he accordingly ed her: when she became of proper age rry, he gave her to the plaintiff in mar- in 1268; that, after the marriage, she times lived with the plaintiff and some- times with Ram Chunder, the adopting father; that subsequently Juggessur, the natural father, managed to get possession of the girl, and to marry her to Jodoo Ghose. The plaintiff, therefore, sues to obtain possession of his wife.

Ram Chunder supports, in his answer, the statement of the plaintiff.

Juggessur, denying that he resigned all the rights of a father in favor of Ram Chunder, admits that he put his daughter under his care to be brought up; but that Ram Chunder had no authority to dispose of her in marriage; and that she was not married to the plaintiff with his consent.

The first Court found that Kudumboni was given to Ram Chunder, and was adopted by him; and it finds that she was married to Golamee, and that such marriage was legal. The Court accordingly decreed to the plaintiff the right of claiming his wife.

On appeal to the Judge, that officer holds that "the alleged marriage of Kudumboni "with the plaintiff is null and void, for, ad- "mitting the plaintiff's version of the case "to be true, it is not possible for a father to "divest himself of all rights over his daughter, "and the alleged transfer of Kudumboni was "illegal and unnatural."

On these grounds he dismisses the plaintiff's suit.

The father admits that he made over his daughter to the care and custody of Ram Chunder, when she was an infant of two years old; she lived with him admittedly for several years. The Moonsiff finds that in 1268 Ram Chunder gave her in marriage to the plaintiff, and the Judge does not say he disagrees with the Moonsiff in this finding. It further appears that it was not till 1271 that Juggessur, the natural father, married her to Jodoo Ghose.

Thus, it appears to us, from the facts of the case and the conduct of Juggessur, that he constructively gave his daughter to Ram Chunder to dispose of. He gave her to him when she was an infant; he left her with him till the proper time arrived, when a husband ought to be provided for her; he allowed the plaintiff to marry her, and did nothing to impeach or question the validity of the marriage for four years. We think that this conduct on the part of the natural father shows that he constituted Ram Chunder the guardian of his daughter; and that he acquiesced in, and ratified, the act which gave her in marriage to the plaintiff.

It is certainly true that, by the Hindoo Law, no one but the father, while the father is alive, can give his daughter in marriage,

but a father can delegate his authority to another, and this we hold he did in this case. Nor is the objection, which the pleader for the respondent has raised before us, that such a suit cannot be entertained of any avail. The reason assigned is that there is no provision in law how a decree for the possession of a wife is to be enforced; but it is as easy to deliver over a wife to her husband as any other property to which he is entitled.

In this view we reverse the judgment of the Appeal Court, and restore that of the first Court with all costs of suit.

The 9th August 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Hindoo Law—Dissolution of Marriage—Koolin Brahmin—Want of guardian's consent.

Case No. 259 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 31st December 1864, reversing a decision passed by the Moonsiff of that District, dated the 31st August 1863.

Modhoosoodun Mookerjee (one of the Defendants), *Appellant,*

versus

Jadub Chunder Banerjee (Plaintiff), *Respondent.*

Mr. R. E. Twidale and *Baboo Sreenath Doss* for Appellant.

No one for Respondent.

A Koolin brahmin is not such a natural guardian of his daughter as the mother. The want of a guardian's consent will not invalidate a marriage otherwise legally contracted and performed with all the necessary ceremonies.

PLAINTIFF, alleging that he is a Koolin brahmin, sues to have his daughter's marriage, which she has contracted with an inferior brahmin without his consent, annulled.

The defendants plead that the plaintiff is a Koolin with numerous wives; that his daughter was married with the consent of her mother, who is her guardian in the almost perpetual absence of her father; and that her mother received 200 rupees from the bridegroom; that, the marriage ceremonies having been performed duly, the marriage is under Hindoo Law indissoluble.

The first Court dismissed plaintiff's suit. The Principal Sudder Ameen decreed it, and the defendants have now specially appealed on the point of law as to the indissoluble nature of a Hindoo marriage.

On the facts found in this case we have no doubt that the marriage of plaintiff's daughter cannot be dissolved. The father of the girl is a Koolin, visiting after lengthened absences the mother of his daughter. The mother in his absence is her guardian, in straightened circumstances; and she gave her in marriage to a brahmin of an inferior grade to the plaintiff for a consideration of 200 rupees, and the ceremonies were all duly performed.

Under these circumstances, we have no doubt that the marriage is indissoluble as laid down in the *Vyvasta* of the Pundits. The Principal Sudder Ameen decided against the marriage, simply on the ground of the want of consent of the father, the natural guardian of the daughter; but Koolin brahmins are not such natural guardians as the mother of their daughter, and, even if they were not so, the want of a guardian's consent (though doubtless it ought to be obtained) would not invalidate a marriage otherwise legally contracted, and performed with all the necessary ceremonies.

We reverse the judgment of the Lower Appellate Court, reversing the order of the first Court. The costs of the special appeal will be borne by the plaintiff, respondent.

The 9th August 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Limitation—Suit for possession of ancestral property—Inheritance—Cause of action of collateral heirs.

Cases Nos. 294 and 295 of 1864.

Regular Appeals from a decision of Baboo Doorga Pershad Ghose, Principal Sudder Ameen of Nuddea, dated the 30 April 1864.

Case No. 254.

Shama Soondery Dossea (Plaintiff), *Appellant,*

versus

Tarinee Churn Sing and others (Defendants) *Respondents.*

Mr. W. A. Montriou and *Baboo Gopal Lall Mitter* for Appellant.

Mr. R. V. Doyne and *Baboos Dwarkanath Mitter, Banee Madhub Banerjee,* and

d

Issur Chunder Chuckerbutty for Respondents.

Case No. 295.

Bungseedhur Ghose and others (Plaintiffs), *Appellants*,

versus

Tarinee Churn Sing and others (Defendants), *Respondents*.

Baboos Kishen Kishore Ghose and *Sreenath Doss* for Appellants.

Baboos Dwarkanath Mitter, *Banee Madhub Banerjee*, and *Issur Chunder Chuckerbutty* for Respondents.

B and *P*, two sisters, not being heirs, took possession of ancestral property, as heirs, on the death of their brother *H*. After a few years, they both quarrelled. *P* adopted a son, and executed a deed of gift in his favor. *B* claimed the whole property through her deceased husband as heir of *B M*, who again was heir to the maternal uncle, on whose death *H* had succeeded. HELD that, in the absence of any agreement creating a life-estate in favor of the two sisters, the cause of action of the collateral heirs arose from the time that *P* quarrelled with her sister, and adopted a son.

THESE are two suits by different plaintiffs against the same defendant; they have been heard separately, but may properly be decided together, for limitation is pleaded against both plaintiffs, and, if we decide that point in favor of defendant, both plaintiffs will be equally defeated; while, on the other hand, if limitation does not save the defendant, it is clear that he has no case on the merits, and the only question would be between the two plaintiffs—an issue which could hardly be tried in either of these suits, if, indeed, such an issue called for decision, it having been stated that there is some understanding between the two plaintiffs.

Be that as it may, we have confined the hearing in both cases to the point of limitation, and we find ourselves in a position to decide them both on that ground. It is, therefore, unnecessary to enter into the issues on the merits.

The features of the case (as we may now call it) are certainly peculiar.

The property belonged to one Romanund. He and his wife Heeramonee had one son Dwarkanath, and two daughters Brijo Soonduree and Pearee Soonduree.

The son Dwarkanath, a minor, succeeded his father in 1225, and the estate being embarrassed it was taken into the charge of the Court of Wards.

In 1234 Dwarkanath died unmarried. He in due course of law succeeded by his mother Heeramonee. Immediately after this event, the two daughters Brijo and Pearee (being both then married women) petitioned the Collector, asserting that their father's nephews, and especially Hargobind (now represented by the plaintiff in No. 295), were trying to get hold of their mother in order to divert the inheritance from the daughters; that Hargobind deceived their mother, and tried to induce her to adopt him; that they (the daughters) were, in truth, the sole heirs of their father, mother, and brother, and they prayed that their names might be registered along with that of their mother as being the true heirs to the exclusion of Hargobind and the collaterals; and that their husbands might be appointed managers. They recited, at the same time, that they were capable of bearing and expecting to have children to take the property. The Collector enquired into the matter, and decided in favor of the daughters, whom he declared to be the true heirs. He accordingly registered their names with that of their mother. Now, there cannot be the least doubt that this was entirely a mistake. The estate having devolved to Dwarkanath, his sisters were not, according to Hindoo Law, his heirs. But, in fact, the succession did follow this line. Pearee's husband died (in 1235 it appears), and in 1240, when Heeramonee died, Brijo was still a married woman, Pearee was a widow. The two sisters then applied to have their names recorded as proprietors, which was done, and Chanda Pershad, husband of Brijo, was appointed *Surburakur*, or manager, in their joint behalf under the Court of Wards. A little time after, in 1243, the estate was restored to them from the management of the Court of Wards. They were thus acknowledged and recorded proprietors, and it may be here mentioned that the collaterals, after disputing the matter in the first instance in the years immediately succeeding Dwarkanath's death, and having been beaten by the decision of the Collector, seem to have subsided into silence, and do not again appear on the scene till after the death of Pearee. But the two sisters in their subsequent petitions repeatedly recite their victory over Hargobind and the collaterals as being, as it were, the foundation of their title. They repeatedly asserted and maintained their joint right.

A little further on, the two sisters quarrelled. From 1245 they seem to have disagreed. In 1246 we find them in full contention in the Criminal Courts and elsewhere. Brijo disputed Pearee's right, but Pearee was maintained in possession of her

half share, which it is clear that from this time she enjoyed separate from, and in a hostile attitude towards, her sister.

In 1247 we find Brijo petitioning against her sister as wrongfully pretending a right to and being about to adopt a son. The son seems to be adopted in 1249, and in 1252 we have public recitals of his adoption, so that there cannot be the least doubt of the *factum* of his adoption rightly or wrongly. It appears that, in addition to adopting the son, Pearee also, "to prevent disputes," executed a deed of gift in his favor. This adopted son then obtained Pearee's share of the property, and is the defendant in the action before us. The sole question at present is, whether either plaintiff has brought the suit within the term prescribed by law from the time when the cause of action arose. The case is governed by Act XIV. of 1859. Pearee died in 1257. Brijo made several threats and demonstrations, and intimated her intention to bring suits to oust Pearee and the defendant. Soon after the quarrel between herself and her sister, she set up a story that she had a son Banee Madhub, who was the heir of his uncle Dwarkanath, who, after succeeding, died in infancy. Brijo herself died in 1265. Her husband Chanda Pershad had previously died (without, it would seem, having set up any claim to the property), and their daughter Shama Soonduree now claims the whole property as never belonging either to Brijo or Pearee, but hers through Chanda Pershad, her father, who was heir of Banee Madhub, her brother, who again was heir of Dwarkanath, his maternal uncle. The whole story of the existence of Banee Madhub is strenuously denied; but we have not entered upon that question, which is rather, as we have said, a question between the two plaintiffs.

The present suits were brought nearly 12 years after the death of Pearee. If we date the cause of action either from Dwarkanath's death, and the erroneous entry of the daughter's names, along with that of their mother, or from Heeramonee's death (which was the real point of misinheritance), or from the date of the quarrel between Pearee and Brijo, the hostile action of Pearee, and the adoption of the defendant Tarinee, both suits are out of time.

For the collaterals it is asserted that out of consideration for the daughters of Ramanund, and to give them the means of support, the heirs consented to their holding the property for their lives, reserving to themselves the reversion after the death of the ladies. And it has been very fully argued on behalf of both appellants that Pearee must be considered, either by permission or in the assumed character of a female heir, to have taken and held a female life-estate only; that consequently on her death, that limited estate ceasing, a right of action accrued to the true heirs of Dwarkanath, of which they have availed themselves within 12 years of her death.

We may at once say that we have no doubt whatever that the evidence brought forward to prove an agreement to give the ladies a life-tenure is wholly unworthy of credit—in fact, quite untrue. It cannot be supported by serious argument. It is clear to us that the two sisters of Dwarkanath came in, in direct hostility to the collateral heirs, and held in direct hostility to them. The only question is whether it can be assumed that, without express consent and agreement, the true heirs tacitly waived their rights in favor of the ladies rather than go to law with them in such a way that, by reason of an implied consent, the cause of action did not arise during the existence of that consent and acquiescence. During the time that Brijo Soonduree, her husband Chanda Pershad, and her sister Pearee, lived in amity, it might be possible to consider that Chanda Pershad did not care to disturb his sister-in-law's supposed life-interest; and it might be a very nice question, whether a person wrongfully claiming a life-interest, and wrongfully obtaining possession as a life-tenant, would, by the Law of Limitation, be placed as wrong-doer in a higher position, than if she really had what she claimed. There is no fraud or concealment; it was a mere mistake of law.

The learned Counsel, Mr. Montriou, contends that, as Pearee claimed as the heir of her father, mother, and brother, she, in fact, claimed the limited estate which alone a female can take; and that, if the heirs suffered her to take that estate, they, nevertheless, did not surrender their ultimate rights, and were entitled to come in at her death. Mr. Doyne, on the other hand, argues that we must abide by the plain words of the present law, the cause of action having really accrued from the moment when Pearee, being no heir, took possession as heir, and no express agreement by which a limited tenure was created being made out. It may be a question whether, as argued by Mr. Doyne, we ought not to consider the possession of Pearee to be adverse from the death of Heeramonee in 1840 in the one

case, or that of Banee Madhub, in 1841, in the other; and that in this view the plaintiffs are many years ago barred by limitation. But, be that as it may (we do not think it necessary to give a distinct opinion on the point), we are quite clear that, in the absence of any agreement creating a limited estate, all ground on which a tacit permission can be pleaded ceased from the time when Pearee (and the defendant Tarinee) took up an attitude altogether hostile to her sister, and fatal to all subsequent claims of the other heirs, that is, from the time when she quarrelled with her sister, and with or without right adopted a son. Although the collaterals did not take direct part in the dispute regarding the latter proceeding, it was done so openly and ostentatiously that we can have no doubt whatever of their knowledge of it. Probably from the first as regards the collaterals, and from 1245 or 1246 as regards Brijo Soonduree, Chanda Pershad, and their family, and certainly from 1249 as regards both plaintiffs, we have no doubt that Pearee and Tarinee, as her alleged son *de facto* adopted, took up a position wholly, completely, and in every sense hostile to, and inconsistent with, the claims of the plaintiffs. The cause of action must, in every possible view, be considered to have arisen from the year 1249 at the very latest. In that view, then, both cases are out of time, and both appeals are dismissed with costs.

The 10th August 1865.

Present:

The Hon'ble H. V. Bayley and G. Campbell, *Judges.*

Sale of tenure under Act VIII. of 1835 (Effect of).

Case No. 184 of 1865.

Application for review of judgment passed by Messrs. Justices Bayley and Campbell, on the 26th January 1865, in Regular Appeal No. 333 of 1863.

Dwarkanath Doss (Respondent), *Petitioner,*

versus

Manick Chunder Doss (Appellant), *Opposite Party.*

Mr. G. C. Paul and *Baboo Sreenath Dass* for Petitioner.

Baboos Onoocool Chunder Mookerjee and *Greeja Sunker Mojoomdar* for Opposite Party.

A sale of a tenure under Act VIII. of 1835, for arrears of current revenue, conveys the whole tenure free from all encumbrances.

On a full consideration of this case, we dissent from the doctrine laid down by the decision of the late Sudder Court, in the case of Satkowree Mitter (page 26 of 1851), to the effect that a sale of a tenure under Act VIII. of 1835 does not convey the tenure free from all encumbrances, but only the rights and interests of the debtors. Looking to the general policy of the Revenue Laws, to the terms of Regulation VII. of 1799, Section 15, Clause 7, to those of Regulation VIII. of 1819, Section 18, Clause 4, and Act VIII. of 1835—also to the analogy and presumption derived from the re-enactment of those provisions contained in Section 105, Act X. of 1859—we think that the sale of a tenure for arrears of current revenue is a good sale of the tenure itself, and carries the rights of all interested in it, giving to the purchaser the tenure in the shape in which it was originally created, and destroying all rights of all persons holding either jointly with or under the debtor as undivided sharers or sub-tenants not otherwise protected. The latter decision of the Sudder Court of 21st April 1859, in the case of Mr. R. Savi, may be considered to go to the same extent in opposition to the former decision of 1851.

It is further argued for the petitioners that we have neglected an important plea, *viz.*, that they had applied to the zemindar for registry, and that he should have included them in his suit for rent; that we should, therefore, ascertain the truth or otherwise of that plea, and, if it be true, protect the petitioners on that ground. Whatever might be the remedy in such a case, we do not find that this special ground was taken as one of the grounds of review or admitted as such, and we will not entertain it now.

On the general ground, then, that the tenure was sold for the current year's rent, and that such sale conveys the whole tenure, we dismiss the petition with costs.

The 11th August 1865.

Pres nt:

The Hon'ble H. V. Bayley and G. Campbell, *Judges.*

Defamation—Privileged communication—Justification.

Case No. 1098 of 1865.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 27th January 1865, modifying a decision passed by the Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen of that District, dated the 27th June 1864.

Shibnath Tulaputtro (Defendant), *Appellant,*

versus

Sat Cowree Deb Moonsiff (Plaintiff), *Respondent.*

Mr. J. S. Rochfort and *Baboo Debendro Narain Bose* for Appellant.

Baboo Onoocool Chunder Mookerjee for Respondent.

A party, in applying to the Judge for the transfer of a case from the Moonsiff on the ground of hostility between them, is not privileged in charging the Moonsiff with other matters, to justify which the party must prove the charges to be true, or that he had reasonable ground for believing them to be true.

THIS is a suit for libel. Plaintiff is a Moonsiff, in whose Court defendant had a suit. Defendant petitioned the Judge, alleging that the Moonsiff was hostile to himself and a friend of his adversary, and praying that the suit might be transferred to another Court. Besides these grounds, the defendant also accused the Moonsiff of borrowing money from his adversary, and of falsifying evidence in another case. The Judge seems not to have transferred the case, but directed the Moonsiff to bring a criminal charge for defamation against the defendant. The Moonsiff brought a civil action, the case now before us. The Judge substantially finds that there was much hostility between the Moonsiff and the defendant; and that the Moonsiff had used very intemperate language against the defendant; that there was, therefore, abundant reason for applying to have defendant's case transferred. But he properly observes that this will not justify the insertion of any charges in the petition, and that the defendant to justify must prove either that they were true, or that he had reasonable ground for believing them to be true. As regards the graver charges, he finds that there is not such proof; and he awards as damages 500 rupees with full costs on the whole sum claimed, 3,000 rupees. It is now urged that the communication was privileged. We are clear that, in the absence of any proof of reasonable ground for believing the graver charges to be true, they are not privileged. As respects the amount of damages and costs, that is not matter for special appeal, though we think it matter for regret that, since a good deal of the matter on which defendant sought a transfer of his case was well founded, the case was not transferred.

The 11th August 1865.

Present:

The Hon'ble J. B. Phear and E. Jackson, *Judges.*

Damages—Remand—Issues.

Case No. 123 of 1865.

Regular Appeal from a decision passed by Mr. H. B. Lawford, Judge of Jessore, dated the 5th February 1865.

Norendro Coomar Dutt Chowdhry, Executor on behalf of Seetula Dabee, widow of Hurrish Chunder Dutt Chowdhry and others (Plaintiffs), *Appellants,*

versus

Mr. G. French and others (Defendants), *Respondents.*

Baboos Onoocool Chunder Mookerjee and *Dwarkanath Mitter* for Appellants.

Baboos Juggadanund Mookerjee and *Aushootosh Dhur* for Respondents.

In a suit for damages on account of crops carried off and appropriated by the defendant's agents, the actual seizing of the crops never having been disputed or put in issue—HELD that the Court was wrong in allowing that question to be at the last moment litigated before him upon the remand of the case for the purpose of trying the lawfulness or unlawfulness of the seizure and appropriation.

THIS suit was brought to recover the value of certain crops said to have been carried off, and appropriated by the principal defendant's agents from certain specified land in the cultivation of the plaintiff's vendors.

The case first came on for hearing before Mr. Russell, Judge of Jessore, who in effect non-suited the plaintiff on the ground that he had misconceived his ground of action.

Mr. Russell had framed the three following issues as being the issues between the parties, namely :—

1st.—Are the plaintiffs or are the defendants in lawful possession of the lands specified in the plaint ?

2nd.—Did the defendants wrongfully trespass on the plaintiff's lands ?

3rd.—If they did, what is the value of the crops plundered ?

After hearing some of the plaintiff's evidence, the Judge said: "There is no occa-"sion to waste time by examining more "witnesses of the plaintiffs, for it is quite "clear this action cannot lie." From a subsequent part of the Judge's judgment it would seem that he considered the plaintiff's claim untenable for two reasons : *1st*, because the real matter in dispute between the parties amounted to a charge of trespass, and was not properly expressed by the words of the plaint ; and, *2ndly*, even if it was comprehended in the plaint, the ownership and possession of the lands alleged to have been trespassed upon had been previously adjudicated upon by a competent Court.

Against this decision the plaintiffs appealed to this Court, and the result of the appeal was that the case was remanded. Mr. Justice Levinge, one of the Judges who heard the appeal, said : "In my judgment the "true nature of the claim put forward in "this suit has been mistaken. It may be "true that the plaint is not as specific as "it should be ; but the Court had power "to frame an issue to try the title to the "*crop*, which has been stated to have been "illegally appropriated by the defendants." He added: "The first issue to try is whether "the crops were lawfully grown by, and were "the property of, the plaintiff's vendors." Mr. Justice Steer, the other Judge in appeal, said : "I agree in the order of re-"mand of my colleague, but, I think, as the "plaintiff claims damages on account of a "crop grown on land decreed in a particular "suit, it is in respect of those lands that "the answer of the defendant is drawn "up. The first issue to enquire is whether "the crops were really grown on the decreed "lands, and in case it is not proved to have "been so grown the case ought at once to be "dismissed."

On this remand from the High Court, Mr. Lawford heard the case. In his judgment he says : "The case has been remanded "by the High Court for the trial of the "issues, whether the crops claimed by the "plaintiffs were grown on lands decreed in "the former suit, and whether the crops "were lawfully grown by, and were the "property of, the plaintiff's vendors ?" He then says that both these issues were admitted by the defendant's vakeel to be as the plaintiffs contended, and he therefore decided them in favor of the plaintiffs. Having come to this conclusion, he proceeds to try whether the defendant ever cut and carried off the crops in question : he arrives at the conviction that he did not, and, therefore, gives a decree in favor of the defendant. Against this decree the plaintiffs now appeal to this Court, mainly on the ground that the Judge on remand had no other issues before him except the two issues specifically mentioned as sent down to him by the High Court, and also that the defendant never had seriously denied the fact of the crops having been cut and carried away. We think this contention is just. It is remarkable that, from first to last, through the various proceedings, no formal issue has ever been raised relative to the taking and carrying away of the crops. Neither Mr. Russell nor the High Court disclose the slightest hint that this was a fact in dispute ; and yet, if it was in dispute, it lay at the root of the whole matter, and ought to have formed the subject of the first issue laid down between the parties. It is hardly conceivable that both the Courts—nay, even Mr. Lawford himself—should have overlooked this point. The only possible conclusion is that the actual taking and appropriating was not part of the subject of contest, while the real fight was as to its lawfulness or unlawfulness. And this view of the matter is strongly borne out by the way that Mr. Russell dealt with the case. It is true that the defendant, in his written statement, denied that his agent had seized crops ; but he gives a reason for his denial which may be expressed thus: "The accusation refers to what my "agent did when he took possession (errone-"ously as it now turns out) of the spe-"cified lands, under a decree in my favor ; "and as those lands were *jummaye* lands of "ryots, and not *khas kamer*, he must have "left the ryots and their crops where they "were, and could not have taken khas "possession." But when we look at the proceedings in the suit to which the defendant refers, we find that it was a suit for *possession* brought against the *ryots themselves* who are the plaintiffs' vendors, and consequently the taking

possession under that decree could only be by ejectment of those ryots, which would, of course, include the seizure and appropriation of those crops of the ryots which were at that time on and in the ground.

On the whole, we have no doubt whatever that as, under the circumstances of the case, the actual seizing of these crops could not be seriously disputed, so it was nowhere in the proceedings formally put in issue, and we therefore think the Judge below was wrong in allowing the question to be at the last moment litigated before him. The appeal is decreed with all costs.

As the evidence on the record is not sufficient to enable us to give any final decision as to the value of the crops taken from the plaintiffs' vendors, the case must be remanded for the trial of the following issue :—

What was the value of such of the crops growing in and upon the lands specified in the plaint at the time of the taking possession of the said land by the defendants' agents as have not been subsequently restored to the plaintiff or his vendors, and what is the amount of the damages which have naturally accrued to the plaintiff from his having been deprived of the same !

The 11th August 1865.

Present :

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Deed of Gift—Will.

Regular Appeals from decisions passed by Baboo Degumber Biswas Rai Bahadoor, Principal Sudder Ameen of Moorshedabad, dated the 1st October 1864.

Case No. 6 of 1865.

Chunder Mohinee Dossee (Plaintiff), *Appellant,*

versus

Hurrosoonduree Dossee (Defendant), *Respondent.*

Baboos Kishen Kishore Ghose, Dwarkanath Mitter, Sreenath Doss, and *Banee Madhub Banerjee* for Appellant.

Baboos Chunder Madhub Ghose and *Unnoda Pershad Banerjee* for Respondent.

Case No. 59 of 1865.

Hurrosoonduree Dossee, Guardian and Mother of Rada Mohun Singh (Minor Plaintiff), *Appellant,*

versus

Chunder Mohinee Dossee, for self and as Guardian and Mother of alleged adopted son Lullit Mohun (Minor Defendant), *Respondent.*

Baboo Chunder Madhub Ghose for Appellant.

Baboos Dwarkanath Mitter and *Sreenath Doss* for Respondent.

A deed professing to be a will, but making a gift of property during the testator's lifetime, was held to be a deed of absolute gift, and not a will, with reference to the conduct of the testator and the surrounding circumstances.

THE plaintiff, Hurrosoonduree Dossee, widow of Gour Loll, sues on behalf of her minor adopted son to obtain possession of the estate left by her husband, which is in possession of the defendant Chunder Mohinee as guardian of the minor adopted son of Sham Loll, son of Gour Loll. It appears that Gour Loll, during his lifetime, on the 3rd Shrabun 1255, executed and registered a deed, which, it is contended by the plaintiff, must be considered a will in favor of Sham Loll ; while, on the other hand, the defendant asserts that it was an absolute deed of gift of Gour Loll's whole estate to his son Sham Loll. Whichever it was, it is admitted that until the year 1262 Gour Loll remained in possession of that estate ; and that in that year his son Sham Loll having become of age, Gour Loll and his wife Hurrosoonduree left their house, and went on a pilgrimage to Brindabun. Sham Loll then obtained possession of the estate, and managed it until the date of his death in 1263. Shortly after this took place, Gour Loll returned home, and it is shown that, not long after, disputes broke out between Gour Loll and the defendant Chunder Mohinee, widow of Sham Loll ; the result of the proceedings taken in the summary department being that the disputed deed was declared to be a gift, Sham Loll to have obtained possession under that gift of his father's estate, and Sham Loll's widow retained in possession. The present suit is to set aside these summary orders, and the main point at issue is the construction to be put upon Gour Loll's deed of the 3rd Srabun 1255.

The following is a translation of the deed :—

b

To the abode of all felicity.

Hurrosoonduree Dossee.

This will is executed by Gour Loll Singh to the following effect: that you are my wife; that, as no child is born of you, and as there is no likelihood of your bearing any child, I have, with a view* to preserve the lineage, adopted Sham Loll Sing as my son, performed the ceremonies, &c., of "*Kurnobed*" and "*Pootreshtee*," and, having celebrated his marriage, have been giving him education; that, although after my demise there is no other heir to my moveable and immoveable properties than yourself and the minor adopted son, yet, considering it proper to make a disposition of my real and personal properties, *i. e.*, to make known my will, I do of my own accord, and without any persuasion, execute this will on the following conditions: That my rent-bearing and rent-free lands, zemindary and putnee talooks, tanks, gardens, different descriptions of jummas purchased and held in jote, dwelling-houses, pucka and thatched houses, &c., monetary transactions, &c., gold and silver ornaments, and ornaments set with precious stones, silver-laced, woollen clothes, &c., brass, bell, metal, copper, &c., utensils, furniture, and cash, &c., all and every property situated in whatever district, belong to the said minor adopted son; that, until he attains majority, from this day, you will, as guardian, look after and manage the affairs of the properties, real and personal; that, on the said adopted son's attaining majority, he will hold, enjoy, and appropriate from generation to generation all the above-mentioned properties with power to dispose of the same by sale or gift; and will maintain the rites and worship of the gods of my ancestors and ceremonies for the benefit of the souls of my forefathers; that if, on the said son's attaining majority, he does not agree with you, you will get from the said adopted son, on the whole, rupees 30 per mensem for your daily expenses, and those of pilgrimage; that the ornaments which you have for your use are yours; that, besides this, you have no concern whatever with the above properties, &c.; that if, by God's blessing, a son is born of your womb, and if he remain alive, then a moiety of the above real and personal properties will belong to the said adopted son, and the remaining half will be obtained by the son of (my) loins; that in that case you will not get the above monthly allowance; that from this date my right to dispose of the aforesaid properties, real and personal, by sale or gift, ceases to exist. On these conditions I execute this will. *The end.*

* Original unintelligible.

The plaintiff relies upon the distinct statement by Gour Loll in this deed, that it is a "WILL," repeated three times over, and upon the fact that it makes over to Sham Loll the whole of Gour Loll's property, including his house, household utensils, clothes, and, indeed, everything which he possessed. It is said that it is impossible to suppose that Gour Loll, a person at the time in a sound state of health, and not very old, should, without any reason, divest himself of every article of property in his possession in favor of a mere child; whereas it is quite consistent with the ordinary acts of a Hindoo gentleman that he should make a will to the effect that his son Sham Loll should take all his property after his death, as the inheritance would go to such son in due course of law. The clause also which makes provision for a natural son being born to him is read to us as proving that Gour Loll still retained in his own hands the right of making further arrangements with his estate. It is pointed out that the deed contains no clause under which Gour Loll retained for himself even any monthly allowance as maintenance, though such an allowance is expressly assigned to his wife Hurrosoonduree. The oral and other documentary evidence in the case is also adduced as proof that Gour Loll did not take any steps to make over this property into the name or possession of either Sham Loll or of Hurrosoonduree who was appointed his guardian under the deed; but that he remained, in fact, himself in possession for all beneficiary purposes. It is further urged that, even if the deed is in its purport one of "*gift*," that "*gift*" was not carried out or completed. It may have been registerd; but the property given was not *delivered* over to the *donee;* and the gift, therefore, could, at any time, be re-called. Finally, very great reliance is placed upon the fact that the deed was executed on plain paper, which if correct, the deed was a "*will;*" whereas it would have been drawn out on stamp-paper, if the deed had been intended to take effect as a "*gift.*"

For the defendant, on the other hand, it is contended that the *terms* of the deed have to be looked to, and not the *name*, which is given to it; the more so as "*wills*" in the European sense are not generally executed, or understood by Hindoos; and that its terms are precise and distinct, as Gour Loll

therein divests himself of all right and interest in his whole property *from the day* on which he executes the deed, and adds a clause under which he deprives himself *from that day* of all power and authority to have any future dealings with that property. It is true, it is said, that there is a condition with the deed of gift, *viz.*, that, in case of another son being born, that son shall obtain a half share of the property; but this clause does not deprive the deed of its character as a gift, but makes the gift conditional. The deed being in favor of a minor son, there was nothing extraordinary in the fact that no special allowance was retained for the father's maintenance, as the property would naturally still remain in the father's hands *in trust* for his son; and it was, therefore, immaterial whether the father remained in possession or not. But the oral and documentary evidence is referred to as proving that, about the time that Sham Loll came of age, his father Gour Loll went away on pilgrimage to Bindrabun, and left Sham Loll *in full possession* of the whole estate; and that, on Sham Loll's death, his widow took possession of that estate, and for some time retained possession without any objection on the part of Gour Loll; and that the disputes which subsequently broke out between them arose from a difference between Gour Loll and Sham Loll's widow respecting that boy Gour Loll wished to be adopted as Sham Loll's son.

It is certain that there is, on the face of the disputed deed, an ambiguity, and it is one which it is difficult to reconcile if the terms of that document alone are looked to. The result of the interpretation which is to be given to the deed is most important to the two parties who are interested in it. If the deed is a "*will*," the plaintiff is entitled to the whole of Gour Loll's estate. If the deed is a "*gift*," the defendant will take the whole of that estate. The deed on the one hand is described by the maker of it to be his "will." The word *will* is repeated three times over in the course of the document. We hesitate to hold that Gour Loll did not understand what he meant by the word *will*. We could not, under ordinary circumstances, concur in the argument that a gift is, in fact, an act of a person's will, and that Gour Loll used the word will in that sense. Gifts are far better known in this country than wills, and are designated by special vernacular words, such as *Hebba*, *Dán*, &c. If Gour Loll intended by this deed to make a gift of his whole estate, it is more likely that he would have made use of some one of the vernacular terms which are ordinarily used for a gift, and not likely that he would have called his deed by the technical term of "*will*." The plain paper on which it is executed is that proper for a "will," and not that on which it would have been drawn up had Gour Loll intended by it to have made a "*gift*." The deed was formally and deliberately executed, and was taken to the Registry Office, and there registered, not as a "*gift*," but as a "*will*." If we look to the surrounding circumstances as to the condition of Gour Loll at the time the deed was executed, we can see at first sight no reason at all for him at that time to execute a gift of all his property in favor of a minor son, though it is quite intelligible that he should execute a will.

The reasons which are given in the deed for its execution do not assist us in determining the disputed point. Gour Loll states that, although his son Sham Loll, as his adopted and only son, will, after his death, inherit his estate, still he considers it right to make a settlement of that estate. The words are consistent with the intention of making either a "*will*" or a "*gift*," though taken with the circumstances of Gour Loll at the time it would be more consistent with usual custom that the deed should be a will. Nevertheless it is possible that Gour Loll did intend to go out of the ordinary custom and to make "*gift*." After expressing the intention to make a settlement, the deed goes on to state that Gour Loll writes his will that all the real and personal estate which he possesses belongs to his son Sham Loll. This sentence may be indefinite; but, if it stood alone, the word "will" used in the sentence would show that the gift conveyed in that sentence was a *gift by way of will* to take effect after Gour Loll's death. In the next sentence, however, Gour Loll appoints his wife Hurrosoonduree to be "*from that day*" guardian and manager for his minor son Sham Loll, and as such to take possession and enjoy the whole of his moveable and immoveable estate during Sham Loll's minority; and adds that Sham Loll will take possession, and act as owner after he comes of age with full powers of alienation over the whole estate; and adds lastly that his (Gour Loll's) authority to make any future sale or alienation of that estate no longer exists "from that day." It is on these clauses that the greatest reliance is placed to prove that the act of Gour Loll was a gift; and there can be no doubt that

if it was not for the express declaration that Gour Loll was then making his will, those words could bear but one interpretation, *viz.*, that Gour Loll was making a gift of all his property to take effect *from that day*. The concluding sentence depriving himself of all right over the property "*from that day*" is quite irreconcilable with the usual notions under which a person makes his will. But it is an ordinary and natural clause when a person makes a gift.

Can this ambiguity be removed by examining the circumstances of the family, or the acts of Gour Loll, either at the time he executed the deed or subsequently? It is necessary that the evidence on this point should leave no doubt as to what was the intention of Gour Loll at the time he executed the deed. On the one hand, Gour Loll completed all the formalities necessary to the perfecting of his acts, if we are to understand that it was a will. He had it formally and duly registered in the public Registry Office of the district as his will. On the other hand, the formalities which might have attended an act of gift were not fully carried out. The real property was not transferred into the name of Sham Loll or of his alleged guardian Hurrosoonduree, and their names were not registered in the books of the Collector of the District, and it is not shown that during the subsequent seven years Hurrosoonduree, as manager for Sham Loll, exercised acts of ownership, or was put forward to the world as guardian on the part of Sham Loll as the proprietor; but it is admitted that Gour Loll remained in possession. There is no reason to suppose that, after the execution of this deed, and during the next seven years, any reason existed for any change of mind or of intention in Gour Loll towards his son Sham Loll. In all these seven years, Gour Loll continued, notwithstanding this deed, to act as if he were the owner of the property. It is said that during those seven years he acted as trustee for his son, and, even if he did not, that the law will look upon him in the light of a trustee. This may be the case, if we are quite satisfied that Gour Loll did execute a deed of gift. But, in judging of his conduct as proving that he did execute a deed of gift, it cannot be said that his conduct, as far as we have yet seen it, is proved to have been consistent with any such intention. If the defendant's contention is correct, Gour Loll wished to make such a settlement of his property as would prevent his more distant relatives interfering with his adopted son by denying the adoption, or in any other way, and he accordingly transferred by gift to that adopted son his whole estate. He carried out the formality of registering the deed; but he omitted to carry out the formality of registering that son's name, or his guardian's name, in the Collectorate, and of having it generally put forward to the world—acts which must have finally and for ever put an end to any dispute upon the point.

It is, however, pointed out that, during these seven years, two purchases of landed estate were made by Gour Lall in the name of Horrosoonduree as his wife, and as the mother and guardian of Sham Loll. An attempt has been made by Hurrosoonduree to assert her title to these estates as purchased with her *streedhun*; but there is no sufficient proof of this, and there seems no doubt that Gour Loll purchased these two estates with the profits of the general estate, and placed them in the name of Hurrosoonduree as manager and guardian for Sham Loll with reference to the terms of the deed which is now in dispute. It was not a mere benamee purchase in his son's or wife's name, but must have had special reference to this deed, as there is the peculiarity that he styles his wife Hurrosoonduree, manager and guardian of Sham Loll, while he (Gour Loll), the natural manager and guardian, was alive. These purchases then show that Gour Loll, at the time he made them, considered that the provisions of the deed in question before us had come into effect, and that, although he was in nominal possession of his estate, he was acting as trustee for Hurrosoonduree and Sham Loll; and they consequently afford the strongest evidence that Gour Loll did intend, by that deed, to execute a gift of his whole estate in favour of his minor son. Construing the deed by the conduct of Gour Loll, we hold this act of Gour Loll to be more convincing proof of his intentions than the conduct which is relied on to prove that he intended to execute a will which consists mostly of omissions to act. The circumstance that Gour Loll went away with his wife on pilgrimage to Brindabun at the time when Sham Loll came of age, when taken in conjunction with the peculiar terms of the deed, makes it extremely probable that it always had been Gour Loll's intention to leave the country, and thus allow Sham Loll to become the owner of the estate when Sham Loll had reached the age at which he could legally act as owner and proprietor, and it furnishes a reason for Gour Loll's extraordinary conduct

in executing a deed of gift, and not a will in favour of his son. In the course of the year, after Gour Loll went on pilgrimage, his son, Sham Loll, died. His widow, the defendant Chunder Mohinee, then put forward in the Judge's Court a claim to a certificate to the estate of Sham Loll. She then filed the deed in dispute, and a second deed which she alleged had been executed by her husband, Sham Loll, which recited the prior deed, and stated that, under the terms of that prior deed, the whole estate of Gour Loll then belonged to Sham Loll, and went on to will it in favour of any son whom Sham Loll's widow might thereafter adopt. There is evidence to prove that Gour Loll reached his home from Brindabun a month before Sham Loll's widow obtained this certificate, and it is extraordinary that Gour Loll should not then have raised any objection, if not to the granting of the certificate, at least to the construction put upon the deed now in dispute in the will of Sham Loll, if Gour Loll then looked upon that deed as a will, and not as a gift. The deed in question, if a will, had become null and void by the death of Sham Loll; but Sham Loll had treated it as a deed which was in full force as a gift while his father was alive, and under which he had acquired rights over the ancestral estate which he willed away; and his widow was treating it as a deed of gift still in force after Sham Loll's death. If Sham Loll and his widow had put a construction on the deed which Gour Loll did not intend it to bear, we should expect that Gour Loll would have then and there come forward and stated that his document had been misconstrued. So far from this being the case, however, we find from the evidence that Gour Loll not only remained silent, but also for a time assisted Sham Loll's widow in carrying out the directions of her husband's will in obtaining an eligible son to adopt; and, in doing this, we cannot but consider that he adopted, in the fullest extent, the interpretation which Sham Loll and Sham Loll's widow had put upon his deed. Gour Loll's conduct at that time was, we think, only consistent with the fact that this deed, now in dispute, was a gift, and *not a will.* Shortly after this, disputes broke out between Gour Loll and Sham Loll's widow, apparently because they could not agree in the boy who was to be affiliated by adoption to Sham Loll. The subsequent conduct of Gour Loll cannot, therefore, be taken into consideration as indicating his previous intention when he executed the deed.

Although, then, if we looked only to the four corners of the disputed document, we might have some difficulty in satisfactorily interpreting it, still, when we consider it in connection with the acts and conduct of Gour Loll from the time of execution until the time when he quarrelled with Sham Loll's widow as showing his intention, we think that Gour Loll did intend by that deed to put in force the clauses under which he made Sham Loll owner of all his estate *from the day* on which the deed was executed; and that, although he styled that document a will, he then and there virtually made a gift of his estate. He may not then have at all contemplated, and probably did not contemplate, the death of his son Sham Loll during his own life-time, and he might possibly have acted otherwise had he contemplated it. We must, however, accept his act with all its consequences, one of which is that Sham Loll's minor adopted son is entitled to obtain possession of his estate in priority to Gour Loll's second adopted son.

With reference to the argument that the delivery to the *donee* Sham Loll by Gour Loll was not complete, we are of opinion that the purchasers of the landed estate above alluded to show that the delivery was completed, and that Gour Loll, in remaining in possession, held such possession as trustee for Sham Loll.

Under these circumstances, it only remains for us to confirm the decision of the Principal Sudder Ameen, and to dismiss this appeal with costs.

The 15th August 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Case No. 1100 of 1865.

Jurisdiction (of Civil Court)—Ejectment of Tenant by Landlord.

Special Appeal from a decision passed by the Judge of Dacca, dated the 26th January 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 18th May 1863.

Kishen Jeebun Roy and others (Plaintiffs), *Appellants,*

versus

Mr. W. Ramey (Defendant) and others (Objectors), *Respondents.*

Baboo Debendro Narain Bose for Appellants.

No one for Respondents.

Where the relationship of landlord and tenant is admitted by the plaintiff, if he does not choose to proceed under Section 25, Act X. of 1859, his right to sue in the Civil Court is not barred.

THE plaintiff sues for khas possession on the ground that the defendant has, in collusion with an Ameen, caused his name to be inserted in the measurement papers as holding certain lands which he never held. The Court of first instance found the fact for the plaintiff. The Lower Appellate Court, neither on the allegation of the plaintiff, nor on the finding of the Court of first instance, was justified in holding that the special appellant cannot sue in the Civil Court. In a case where the relationship of landlord and tenant is admitted by the plaintiff, if the latter does not choose to proceed under Section 25, Act X. of 1859, before the Revenue Court, his right to come to the Civil Court is not thereby barred. If the defendant is in possession merely by collusion, and not as tenant, the Civil Court has jurisdiction just as it has in any case against a stranger who without right trespasses or intrudes upon land.

The case is remanded to the Lower Appellate Court to try on the merits the appeal pending before it.

The 15th August 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Section 230, Act VIII. of 1859—Procedure if person dispossessed of immoveable property dispute the right of decree-holder to be put into possession of such property.

Case No. 1011 of 1865.

Special Appeal from a decision passed by Mr. E. G. Birch, Judge of Moorshedabad, dated the 17th February 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 16th December 1864.

Neel Madhub Dutt (Plaintiff), *Appellant,*

versus

Radha Mohun and Nawab Nazeem of Bengal (Defendants), *Respondents.*

Baboos Mohinee Mohun Roy, Anund Chunder Ghosal, and *Chunder Madhub Ghose* for Appellants.

Baboos Gopal Lall Mitter and *Kissen Dyall Roy* for Respondents.

To entitle a party to come in under Section 230, Act VIII. of 1859, by petition, and have his case tried in like manner as if he had paid full stamped duty on a regular plaint, he must prove that he was in possession of the land in suit, and was dispossessed by another party, alleging the land to form part of land decreed to him.

THE grounds taken in this petition of special appeal are three :—

1st.—That the Lower Appellate Court should have tried the respective titles of the parties, as the plaintiff's petition under Section 230, Act VIII. of 1859, had been accepted as a plaint, and registered as for the purposes of a regular suit.

2nd.—That the Lower Appellate Court had overlooked a portion of plaintiff's evidence, and had given no sufficient reasons for its finding.

3rd.—That the Judge had held defendant had more lands than he was entitled to, but nevertheless did not give plaintiff a decree for the excess.

Now, Sections 230 and 231 are these :—

Section 230.—"If any person other than "the defendant shall be dispossessed of any "land or other immoveable property *in execu-* "*tion of a decree*, and such person shall dis- "pute the right of the decree-holder to dis- "possess him of such property under the decree "on the ground that the property was *bonâ* "*fide in his possession* on his own account, "or on account of some other person than "the defendant; and that it was not included "in the decree, or, if included in the decree, "that he was not a party to the suit in "which the decree was passed, he may apply "to the Court within one month from the "date of such dispossession; and, if, after "examining the applicant, it shall appear to "the Court that there is probable cause for "making the *application*, the application "shall be numbered and registered as a suit "between the applicant as plaintiff, and the "decree-holder as defendant; and the Court "shall proceed to investigate the matter in "dispute in the same manner and with the "like powers as if a suit for the property "had been instituted by the applicant against "the decree-holder."

Section 231.—"The decision passed by "the Court under either of the two last "Sections shall be of the same force as a "decree in an ordinary suit, and shall be "subject under the rules applicable to ap- "peals from decrees; and no fresh suit shall "be entertained in any Court between the

"same parties, claiming under them in respect to the same cause of action."

The first Court held that plaintiff had not proved his possession and dispossession, but that limitation barred the suit: and the first Court expressly decreed the case as one barred by limitation.

The decision on appeal by the Judge was as follows:—

"The Lower Court should not have entered into the question of limitation, which could not arise in a case of this description, where the first point to be considered was whether the plaintiff was entitled to come into Court under Section 230 of Act VIII. The Sudder Ameen has decided that issue against the plaintiff, and he should have confined himself entirely to that issue. So much of the decision as decides the point of limitation is reversed. As regards possession, I think that the appellant has failed to establish it, and is, therefore, not entitled to come into Court under Section 230.

"I considered that the appellant has no *locus standi* under Section 230, as his possession of the land in dispute is not proved. The question of limitation is left an open question, and, with the reversal of so much of the Sudder Ameen's decision as relates to limitation, I uphold the rest of the order, and dismiss the appeal with costs."

The plaintiff appealed specially against this decision on the grounds before set forth.

It was also urged before us that limitation could not apply, and that the question of the identity of the land had not been duly enquired into. But it is admitted that these grounds were not pleaded before the Lower Appellate Court, and we do not see any sufficient reason in this case to admit them at this last stage, contrary to the ordinary rule.

After a full and careful consideration of the law cited, and of the arguments of Counsel, we are of opinion that the terms of Section 230, Act VIII. of 1859, provide that a party who shall have proved himself to have been in possession of the lands in suit, and to have been dispossessed by another party, alleging that the land forms part of land decreed to him, can come in by means of a petition, and have his case tried in like manner as if he had paid full stamp duty on a regular plaint.

Moreover, if this were not the correct view, the mere allegation of possession and dispossession would suffice to enable any and every party to come in with all the benefit of having his case tried in all respects as a regular suit without any of the costs and trouble of one. The law certainly contemplated this relief only in the very exceptional class of cases here specified, and, therefore, full proof that *the party was in possession, and had been dispossessed*, which is the basis of his cause of action, is indispensable.

In this view we are of opinion that as it has been found as a fact by the Lower Courts that plaintiff had not possession of the land in suit from which he alleges he was dispossessed improperly by the party alleging it to be his land under a decree, plaintiff cannot obtain a decree under the purview of Section 230, Act VIII. of 1859. We consequently think that the Judge was right in holding that the first Court should not have gone into the question of limitation at all, or decided the case on that point.

On this ground we see no reason to admit this special appeal. We accordingly dismiss it with costs.

The 15th August 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Hindoo Law of Inheritence—Widow—Conversion of, to Mahomedanism before marriage with a Mahomedan.

Case No. 1243 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tipperah, dated the 16th February 1865, reversing a decision passed by the Moonsiff of that District, dated the 1st September 1864.

Gopal Singh (Plaintiff), *Appellant,*

versus

Dhungazee and others (Defendants), *Respondents.*

Baboo Roopnath Banerjee for Appellant.

Baboo Khetternath Bose for Respondents.

The Hindoo Law disentitling a widow to inherit, on re-marriage and marriage with a Mahomedan, does not apply to a widow who became a Mahomedan before her marriage with a Mahomedan. According to the principle laid down by Section 3, Act XXI. of 1858, and Section 9, Regulation VII. 1832, conversion does not involve forfeiture of inheritance.

In this case, plaintiffs sued for possession of certain property by right of inheritance

as next heirs to a deceased male Hindoo. Plaintiffs alleged that the widow of the said Hindoo was disentitled to inherit, and doubly so, because not only had she re-married, but had intermarried with a Mahomedan.

The defendant, the widow, claimed, as widow, to have a superior title to the plaintiffs, who were admittedly but reversioners after the widow, had she not re-married.

The first Court held that, under Hindoo Law, re-marriage and with a Mahomedan disentitled the widow, and relied on Section 2, Act XV. of 1856, in support of his view.

The Lower Appellate Court, however, finding as a fact that the defendant was a convert to Mahomedanism *before* she re-married with a Mahomedan, held that the Hindoo Law did not apply to her, and that, under Section 9, Regulation VII. of 1832, the defendant's conversion should not affect any title to property which she might have by inheritance or otherwise.

Plaintiff appeals specially against this decision, and there is, in fact, but one plea, *viz.*, that the defendant, by conversion, re-marriage, and marriage with a Mahomedan, loses all her rights, both by Hindoo Law and with reference to Section 2, Act XV. of 1856.

We are clearly of opinion that the Hindoo Law will not apply to the defendant, as it is found as a fact that, when she re-married, she was not a Hindoo, but a Mahomedan.

We are equally clearly of opinion that the real principle to be kept in view is that of equity and good conscience under Section 3, Act XXI. of 1858; and that, under this principle, and that laid down in Section 9, Regulation VII. of 1832, conversion should not involve forfeiture of inheritance.

In this view, we see no reasonable ground to reverse the decision of the Lower Appellate Court, and we accordingly dismiss this special appeal with costs.

The 15th August 1865.

Present :

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Subsisting Lakheraj tenure—Definition of.

Case No. 1381 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Behar, dated the 10th March 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 8th September 1863.

Maharanee Indurjeet Koonwur (one of the Defendants), *Appellant,*

versus

Ramnath Singh (Plaintiff) and others (Defendants), *Respondents.*

Mr. J. Baptist for Appellant.

Baboo Unoocool Chunder Mookerjee for Respondents.

By "a subsisting lakheraj tenure" is meant one which existed before the 1st December 1790.

In this case, the remand order of this Court of the 20th December 1864 was that the Lower Appellate Court should find: "Is "there, or is there not, a subsisting lakheraj "tenure?" Now, "a subsisting lakheraj "tenure" is one, the existence of which before the 1st December 1790 is shown (*vide* decision of Sudder Dewanny Adawlut, 15th April 1861, and the decision there reviewed).

The ground of special appeal is that this fact has not as yet been found. We are obliged with great reluctance to admit, with the consent of the pleader of the opposite party, that this is so, *viz.*, the fact of there being a subsisting lakheraj or not, *on or before 1st December* 1790, is not found by the Lower Appellate Court. The case must be remanded to be re-tried accordingly.

We request this Principal Sudder Ameen, Baboo Gobind Chunder Shome, will be more careful in future in carrying out such orders of remand. Issue precept for the case to be taken up and decided within one month.

The 15th August 1865.

Present :

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Summary order for execution of decree—Contribution.

Case No. 40 of 1865.

Application for review of judgment passed by Justices Bayley and Macpherson, on the 13th December 1864, in Regular Appeal No. 253 of 1864.

Nund Coomar Singh and others (Respondents), *Petitioners,*

versus

Gunga Pershad (Appellant), *Opposite Party.*

Mr. G. C. Paul for Petitioners.

Baboo Dwarkanath Mitter for Opposite Party.

A summary order of an inferior Court for the execution of a decree may be conclusive as between the decree-holder who obtained it and those against whom it was made, but is not necessarily so against the latter as between themselves only. Such an order has not necessarily the same effect, so far as contribution is concerned, as if it were the original decree in the suit.

In 1860, the holder of a decree nearly 20 years old applied for, and obtained, from the Zillah Court an order that execution should issue against the heirs of Luchmee (the present petitioners) and the heirs of Utum (the opponents). The Court made the order; it was not appealed against; and execution for the whole amount remaining due under the decree was issued and had, but against the heirs of Luchmee only. The latter then sought to recover contribution from the heirs of Utum, instituting for that purpose the suit in which the present application is made to us.

We have held (and, as we still think, rightly so) that the heirs of Utum, at the time execution was sought against them, were in no way liable under the original decree, owing to certain transactions subsequent to that decree; and that, therefore, the heirs of Utum were not liable to contribute. The heirs of Luchmee now pray for a review of our judgment, on the ground that the order of the Zillah Court, granting execution, is conclusive for the purposes of this suit; that this Court cannot now enter into the question of the propriety of that order; and that, therefore, our judgment, which is based on our opinion, that execution ought not to have been granted against the heirs of Utum, is wrong.

We see no reason to interfere with our judgment, so far as this point is concerned. The order for execution has not, as has been contended, exactly the same effect, so far as contribution is concerned, as if it were the original decree made in the suit. It is merely a summary proceeding, which may be conclusive as between the decree-holder who obtained it and those against whom it was made, but which is not in any degree conclusive against the latter as between themselves only. Such an order has no further effect than to enable the decree-holder to execute his decree in the manner ordered. When one defendant has been compelled to pay under such an order, the law will not necessarily presume that the payment was made at the request of the other, and an action for contribution is founded on the presumption that the payment by the one was made at the request of the other.

It is also urged that Utum is not shewn to have given any consideration for the arrangement by which he was relieved of his liability under the original decree; and that the heirs of Utum have, in the present suit, always denied that the arrangement in question ever was made at all. But it is now practically immaterial whether Utum did or did not give any valuable consideration, for the benefits he derived under the arrangement. And, as regards the denial, it is clear that the arrangement was in fact made, and that the very protracted and confused litigation which has been carried on between the parties has throughout had relation to that arrangement, however much the heirs of Utum may in the present suit have chosen to deny its existence.

The 16th August 1865.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Suit for possession by two rival ryots claiming under different Pottahs from same Zemindar—Failure of Pottah—Adjudication of claim to occupancy.

Case No. 1225 of 1865.

Special Appeal from the decision passed by the Principal Sudder Ameen of Rajshahye, dated the 31st December 1864, reversing a decision passed by the Moonsiff of that District, dated the 5th September 1864.

Bydnath Shaha (Defendant), *Appellant,*

versus

Jadub Chunder Shaha (Plaintiff), *Respondent.*

Baboos Issur Chunder Chuckerbutty and *Shib Chunder Moojoomdar* for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

In a suit for possession by two ryots claiming under different pottahs from the same zemindar, when the defendant's pottah fails, he still has a right to have a judicial determination of his claim to occupancy.

We are unable to concur with the Principal Sudder Ameen in holding that, when the defendant's pottah was rejected, he became deprived of all right to the determination of his claim of occupancy. The point of possession or occupancy was fairly one which should have been the subject

of enquiry after the failure of the pottah, because the defendant had distinctly raised it in his answer, and had evidently pleaded it in appeal. The case reported at page 87, Volume II. of the Revenue and Police Journal, is clearly in point (Buddinath Tewaree), in which the learned Judges ruled that a right of occupancy or possession was clearly a point to be tried when pleaded, even though the pottahs had been rejected. The case reported at page 2 of Act X. Rulings of the Weekly Reporter, Volume II., does not seem in point (Mirza Nadir Beg), for there one Judge was of opinion that the whole transaction was a fiction.

In this present case, two ryots are claimants under different pottahs from the same zemindar. When the appellant's pottah failed, he still had a right to have a judicial determination of his claim to occupancy.

The case is remanded for a determination on this point only.

The 17th August 1865.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Jurisdiction—Suit by Zemindar to try validity of pottah put forward by tenant in a suit for damages against plaintiff's ijaradar, and declared by plaintiff to be a forgery.

Case No. 1319 of 1865.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 17th February 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 30th May 1864.

Khobirooddeen and another (Plaintiffs), *Appellants,*

versus

Kishen Dhun Chuckerbutty (one of the Defendants), *Respondent.*

Baboos Mohinee Mohun Roy and *Grish Chunder Ghose* for Appellants.

Baboo Greeja Sunkur Mojoomdar for Respondent.

Suit brought by a zemindar to try the validity of pottah which had been put forward by a tenant in a suit for damages against the plaintiff's ijaradar, which the plaintiff declared to be a forgery, is cognizable in the Civil Court. The pottah having already been publicly put forward in a Court of Justice, the action is not premature.

THIS was a suit brought by a zemindar to try the validity of a pottah which had been put forward by a tenant in a suit for damages against the plaintiff's ijaradar, and which the plaintiff declared to be a forgery.

The Judge, on appeal, reversing the decision of the Principal Sudder Ameen on the merits, has held that such a suit does not lie in the Civil Courts; and that, even if it could be brought, this suit was premature.

The plaintiff appeals from this view of the law. In support of the Judge's finding, the respondent quotes the precedent at page 223 of the Weekly Reporter, Volume I.

On the general question as to whether such a suit will lie in the Civil Courts, we have no doubt that it does lie. Such suits have been always brought in the Civil Courts; and such suits are nowhere in Act X. of 1859 declared cognizable only by the Collectorate authorities. But it is said that there has already been a decision by a competent Court on the point between the parties. We have referred to that decision. We find that plaintiff, the zemindar, was no party to that decision. The issue was not as to the genuineness of the pottah, though the pottah was attested and received in evidence in that case. The precedent referred to by the respondent does not, therefore, apply.

We think also that, as this pottah had been already publicly put forward in a Court of Justice, it cannot be said that the action was premature under any circumstances.

We reverse the Judge's decision, and remand the case for trial of the remaining points which have been raised before him.

The 17th August 1865.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Limitation (Period of, not affected by Holidays).

Case No. 1311 of 1865.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 15th February 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 2nd July 1864.

Messrs. S. E. Collis and T. B. Grant, Executors to the estate of Mr. J. P. McKilligan, deceased (Defendants), *Appellants*,

versus

Tarinee Churn Singh (Plaintiff), *Respondent.*

Baboos Juggadanund Mookerjee and *Kalee Kishen Sein* for Appellants.

No one for Respondent.

Under Act XIV. of 1859, a suit is barred by limitation where the time for its institution expires on a holiday.

THIS is a special appeal from a decision of the Judge of Rajshahye on the point of limitation. The Judge has held that the suit is in time, as the last date on which the plaint could be filed was a holiday; and the plaint was filed on the first open day of the Court after the holidays closed. It is said that this view of the law is erroneous. We find that a Full Bench of this Court has, on a reference from the Small Cause Court of Hooghly and Serampore, ruled that the period of limitation is fixed by Act XIV. of 1859; and no discretion is given to the Courts to extend the time, as the present Limitation Act does not admit of any extension on good and sufficient cause being shewn. We are bound to follow this decision of the Full Bench, and, reversing the decision of the Judge, we dismiss this suit.

The respondent, plaintiff, will pay all the costs of the case.

The 17th August 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Mitackshara Law—Res judicata—Widows (Mortgages, Conveyances, or Transfers by)—Their rights of Inheritance—Separate ownership (Proof of)—Liability of Estate for debts of deceased joint-owner.

Case No. 153 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 6th February 1865.

Mr. Lewis Cosserat (Plaintiff), *Appellant*,

versus

Sudaburt Pershad Sahoo (Defendant), *Respondent.*

Mr. R. V. Doyne for Appellant.

Mr. R. T. Allan and *Baboos Onoocool Chunder Mookerjee* and *Unnoda Pershad Banerjee* for Respondent.

Suit laid at Rupees 9,060, 5 annas, 15 krans.

A mortgage executed by two Hindoo widows, having been declared to be invalid, cannot form the basis of another suit.

According to the Mitackshara Law, a conveyance or transfer of joint property by one member of a family is illegal without the consent of the other members.

By the same law, widows have no part in their husband's joint-estate; and the mere fact of the husband having treated a property as his own, so far as to mortgage it during his lifetime, is no sufficient reason for the conclusion that the property was his separate property, and, as such, descended to his widows.

According to the same law, an estate cannot be burdened with the debts of one of its joint-owners after that person's decease.

THE plaintiffs in this case (appellants before us) sued to recover a sum of Rupees 8,060, 5as. 10 k., as the balance of an advance of 25,000 rupees made by them to Mussamuts Parbuttee and Moheshee Kooer, widows of one Bhugwan Lal, under the following circumstances. There is, we may premise, no contention regarding the sum lent by Messrs. Macleod and Cox. It is admitted by the respondent that 25,000 rupees were advanced, although some question has been raised as to how it was appropriated by the widows.

To return however.—On Bhugwan Lal's death, his widows, who would seem to have taken out the usual administration certificate from the Civil Court, and to have acted as his representatives, negotiated a loan from the appellants of 25,000 rupees, giving, as security, a zur-i-peshgee lease of Mouzah Chataslee, heretofore held by a Mahajan named Bunwaree Lal, and which was released by that individual to Parbuttee and Moheshee Kooer on receipt of 15,000 rupees. The lease was executed on the 14th May 18[illegible] and under it the appellant confessedly took and kept possession of the mouzah till the year 1862.

On the 5th of April of that year, the respondent Sudaburt Pershad dispossessed the plaintiff under a decree of Court, which adjudged to him the mouzah of Chataslee and consequent cancelment of the zur-i-peshgee lease, on the ground that the mouzah in question formed part of the joint family property, and, as such, fell to Sudaburt Pershad as survivor of his relative Bhugwan Lal, the widows under the Mitackshara Law having no succession to such property.

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ing, therefore, incompetent to make the enation to appellants.

The appellants, or rather one of them, Macleod, was a defendant in Sudaburt's , but no appeal was preferred by him, it was only when Sudaburt took out cution of his decree, and thereby ousted zur-i-peshgeedars, that the latter came ard. Their objection was, however, cted by the Judge on the 4th of Deber 1863, and the decree-holder was wed to take possession. Hence the pre- suit.

he Principal Sudder Ameen has held the nce of 25,000 rupees by the appellants, the application of money to the payment hugwan Lal's debts to be clearly proved, has absolved Sudaburt Pershad from lity, on the grounds that the property e over to appellant was part of Bhug- s joint estate which the widows had right to meddle with, and that the was one personal to the widows, pay- by them either from their own resources rom any separate property of Bhugwan which might have come into their s.

he appellants urge—(1.) That the zur-i- gee lease under which they held was set aside by the decrees either of the e or of the High Court in Sudaburt had's case; and that, therefore, although cannot, as mortgagees (the title of their gagors having been declared to be bad), to recover manual possession of the they were still entitled to recover the nce of their advance from it.

) That, as 15,000 rupees of their nce went to release Mouzah Chataslee a previous mortgage held by Bunwaree appellants are in the position of Bun- Lal's assignees, and, as that person's gage was acquired during Bhugwan life, his property of any kind whatso- must be held liable.

) That, even supposing their lien to be in law according to the Mitackshara, are still entitled to equitable relief, as advanced money on a property which been publicly dealt with by Bhugwan during his life-time as his own, and all the world believed to be so. That are *bond fide* purchasers for value ut notice, and are entitled to recover money from the estate which was gaged to them.

d, lastly, that, putting all other consider- s aside, they advanced money which applied to the payment of Bhugwan Lal's debts, and that Sudaburt Pershad, as he takes the estate, must do so *cum onere*, and pay all debts found to be due.

To these objections, it is replied by the respondents that, so far as the mortgage is concerned, the question is a *res adjudicata*, having been already disposed of by the decrees in Sudaburt's case, and by the Judge's order in the "execution" case. The alienation by Parbutee and Moheshee Kooer was set aside by those decrees.

That the doctrine of *caveat emptor* must be applied to parties who choose to advance monies on invalid titles; that the title of the widows to alienate has been declared to be bad; and that the appellants, had they exercised due care and caution, would have discovered that they had no right to alienate the property.

That, admitting the payment for the sake of argument to Bunwaree Lal, that person's mortgage shows that the debt was incurred many years after the family ceased to be joint, and was, therefore, one personal to Bhugwan Lal, and could only be a burthen on his separate estate.

That, were it otherwise, the alienation by one member of a family of any part of the joint property is by Mitackshara Law invalid without the consent of all the members of the family.

That appellants can in no shape be considered Bunwaree Lal's assignees; and that, even if they were, they would be in no better position than they are now.

That, as Sudaburt Pershad did not take the estate as heir of Bhugwan Lal, but by lapse as survivor, he is not liable for the latter's debts.

And, lastly, that a joint proprietor of an estate under the Mitackshara Law cannot burthen that estate with his debts for any time subsequent to the ceasing of his own proprietorship at his death; the estate is absolutely and entirely free from the consequences of any debts contracted by him.

With regard to the *first* objection, we think the finding of both decrees is sufficiently clear. The Judge says on the 10th issue: "I hold that the deeds, executed by any of "the partners, Sunker Sahoo, Bhugwan "Lal, or any others, are valid; and that the "transfer or alienation made by Parbutee "Kooer and Moheshee Kooer are good in "respect of the private estate of Bhugwan "Lal's, but are *not good in respect of any* "*part of the partnership property.*"

The judgment of the High Court on appeal did not touch this part of the Judge's

decree, nor did the present appellants object to it.

And there can be no doubt, we think, that the meaning of the Judge's order was to declare the mortgage, executed by Parbutee and Moheshee Kooer to the appellants, invalid, inasmuch as it referred to a portion of the property which had been declared to have been acquired prior to 1846, and was consequently "joint."

This being so, the respondent's contention, that the mortgage to the appellants, having been already declared to be invalid, cannot now form the basis of another suit, is, we think, well founded. The appellants treated with parties who had been declared to have no power to transfer the property in question, and by law their case is remediless.

Then, with regard to the *second* objection, that appellants might, had they chosen, have taken over Bunwaree Lal's mortgage, on paying him the 15,000 rupees, and so have had a lien on the estate good against all the world; and that they are, therefore, in this case entitled to be considered as Bunwaree Lal's assignees, inasmuch as it was their money that satisfied his claim and released the property.

Now, in the first place, we observe that the receipt of Bunwaree Lal expressly releases the lands of Chataslee to the widows; no mention whatever is made of the appellants in the document, nor any intimation given that the release-money was furnished by them. The deed is a simple release by Bunwaree Lal to Parbutee Kooer and Moheshee Kooer; and, although it passed into the appellants' hands on the occasions of the second mortgage to him, cannot possibly operate as an assignment of the first mortgage, which was absolutely paid off and discharged before appellants had any lien on the mouzah at all.

But, even supposing, for the sake of argument, that the appellants could be considered as the assignees of Bunwaree Lal, we do not see that their position would be in any way benefited. They would be in the same legal difficulty as they are now: for, by Mitackshara Law, the conveyance or transfer of joint property by one member of a family is illegal without the consent of the other members; and, moreover, they could not, as assignees of Bunwaree Lal, plead, as they do now, that the equities of the case were in their favor: for there is nothing to show that Bunwaree Lal took the mortgage *bonâ fide* for a valuable consideration without notice.

Then, as to these "equities," the appellants plead that they treated with persons who dealt with the property as their own, and who were heirs of another person who had in his life-time dealt with the property in like manner; that all the world were deceived into supposing that mouzah Chataslee was the separate property of Bhugwan Lal; and that, therefore, appellants were justified in advancing their money upon it. Cases have been cited, notably that of Honoonman Pershad, decided by the Privy Council, to show that *bonâ fide* purchasers for value, where the property had for a long series of years been treated by the vendors as their own, were protected.

None of these cases, however, are of a like nature with this. No doubt, where estates are held benamee, and the benameedars have for a series of years given themselves out as the real owners, and have exercised all the rights of ownership, a *bonâ fide* purchaser for value without notice would, in accordance with the precedents quoted, receive an equitable consideration; but this case is, in our opinion, very different. The mortgagors were widows, a circumstance in itself that ought to have made the appellants cautious. By the Mitackshara Law which prevails in that district, widows have no part in their husbands' joint estate, and the fact of Bhugwan Lal's having treated the mouzah of Chataslee as his own, so far as to mortgage it during his life-time, was not a sufficient reason, we think, for prudent men to jump at once to the conclusion that the mouzah was the separate property of Bhugwan Lal, and, as such, descended to his widows. Many cases might be cited where one member of a family is the only apparent owner, and has conducted in his own name all the joint transactions; and it has been frequently held that the mere fact of a person treating property as his own is no sufficient proof of absolute and separate ownership. We may observe, in connection with this part of the argument, that this is the first time that such a plea has been advanced. In the plaint, there is nothing said about due care and attention, or that the appellants had endeavoured to satisfy themselves by proper enquiries that the property belonged to Bhugwan Lal's separate estate. Whilst the records of old cases between members of the family, in which this mouzah as well as others were contested, ought to have shewn them how unsafe such a deduction was from such premises.

Taking all the circumstances of the case into consideration, and holding it proved that the appellant did advance the money as

stated, we do not think that they were justified in treating with the widows, or that there was any sufficient ground for their believing that the property belonged to them. They must suffer from their own want of caution in buying from those who had no title.

We come lastly to the appellant's contention that, setting aside the mortgage and all rights derivable from it, they are entitled to recover their money from Sudaburt Pershad as creditors of the estate to which he has succeeded.

It being proved (and we are not disposed to question the Lower Court's finding on this head) that the 25,000 rupees were advanced for the benefit of Bhugwan Lal's estate, and were actually paid to his creditors, Sudaburt, as heir of that estate, is liable to the extent of the assets that have descended to him.

The debts, to the payment of which the 25,000 rupees were applied, were all contracted by Bhugwan Lal after the family became separate, after 1846, that is, and were, therefore, personal and not joint liabilities, and the question that remains is, can an estate, according to the principles of Mitackshara Law, be burthened with the debts of one of its joint owners, after that person's decease?

The precedents that have been quoted to us do not appear to touch the question. They all relate more or less to the dogma that, under the Mitackshara Law, alienations by one of the family are invalid unless with the consent of the other members; and one of them (Agra Sudder Dewanny Adawlut, 1864, page 299) lays it down that alienation of joint property, even to the extent of the alienor's own share, is invalid without such consent.

Select Reports, Vol. IV., p. 161.
Ditto Vol. IV., p. 71.
Ditto Vol. V., p. 164.

But, although these cases do not actually provide for the circumstances now before us, we think that they do lay down, though indirectly, the principle to be followed. By the Mitackshara Law all members of the joint family have a continuing interest in the whole of the family estate; one member cannot alienate even his own share without the consent of all; and nothing but the most urgent necessity legalizes any transfer to third parties. Each member has a life-interest and no more in the property—an interest which he can neither give away during his life-time, nor will away after his death, but which must go to the survivors of the joint family.

And if a joint tenant, such as Bhugwan Lal was, had no power to raise money by alienating his own share even of the joint estate during his life, it seems to follow naturally that he could not burthen that share with the payment of his personal liabilities after his death. His co-sharers had a vested right in that share, and were entitled to receive it free and unencumbered of everything except debts incurred for the benefit of all the partners.

Personal debts must, by the law we are to administer in this case, follow personal and separate assets, and the widows only therefore are liable. It is stated in the pleadings, and nowhere actually denied, that Bhugwan Lal left considerable separate property which his widows now hold. If that be so, the appellants will be able to recoup themselves; but in any case we think that Sudaburt Pershad is not liable as heir for the personal debt of his co-sharer Bhugwan Lal.

We, therefore, dismiss this appeal with costs.

The 17th August 1865.

Present:

The Hon'ble C. B. Trevor, *Officiating Chief Justice*, and the Hon'ble G. Campbell, *Judge*.

Suit under Section 230, Act VIII. of 1859, by person dispossessed of immoveable property disputing decree-holder's right to be put into possession thereof—Possession—Title.

Case No. 135 of 1865.

Regular Appeal from a decision passed by Baboo Koylash Chunder Deb Roy, Principal Sudder Ameen of the 24-Pergunnahs, dated the 30th January 1865.

Nugendur Chunder Ghose (Plaintiff), *Appellant*,

versus

Ram Comul Mundul and others (Defendants), *Respondents*.

Baboos Onoocool Chunder Mookerjee and *Rajendur Misser* for Appellant.

Baboos Dwarkanath Mitter, Unnoda Pershad Banerjee, and *Mohesh Chunder Chowdhry* for Respondents.

In a case under Section 230, Act VIII. of 1859, not only must the plaintiff, *i. e.*, the person dispossessed of immoveable property, who disputes the right of the decree-holder to be put into pos-

session of such property, show possession, but the question of title should also be enquired into.

THIS is a case arising under Section 230 of the Code of Civil Procedure. Plaintiff alleging that he, being in possession of certain property, has been dispossessed by the defendants under color of a decree for the property in a suit to which plaintiff was not a party. The case is in several respects obscure; the facts have been very insufficiently shown in evidence, and the question has been argued at great length on the obscure papers and scanty facts.

Both parties claim the property under one Shumboo Chunder so long ago as 1849. Plaintiff bought, at a Sheriff's sale in Calcutta, the rights and interests of Shumboo Chunder in certain plots of land, of which he alleges that the plots now in dispute (which we shall describe as plots Nos. 1 and 2) are two. In 1861 he brought a suit against Romonee Dossee, a co-sharer of Shumboo, for the said parcels, making the present defendants, or those whom they represent, parties to the suit, because they had acquired a right to the remaining estate of Shumboo. The present defendants replied that they did not claim the plots claimed by plaintiff, and on that plea they were absolved, and decree passed against Kaminee Dossee. The plots then decreed were described as the 5 annas share of Shumboo, represented by so many beegahs within certain larger plots, the boundaries of which are given. In this there is obscurity; the land claimed and decreed may either have been separate minor plots, the boundaries of which were *not* given, or the beegahs mentioned may have represented the 5 annas proportional part of the whole. Plaintiff then proceeded to execute his decree. The Ameen reported that possession had been given to him, and calculated wasilat by taking the whole collections of plot No. 1, and giving plaintiff a proportional share, while of plot No. 2, in default of detailed information, he estimated the average rent to be 25 rupees per beegah, and calculated at that rate on the beegahs constituting or representing plaintiff's share.

Meantime, the defendants had also brought a suit against Kaminee Dossee, and obtained a decree, which certainly included the plots now in dispute. They put this decree in force in 1863, about a year after plaintiff's alleged execution of decree, and, in doing so, took possession of the rights of Shumboo Chunder in the disputed plots, which plaintiff says that he had previously acquired. Plaintiff's present claim seems to have been made as if he intended to represent that he held undivided possession of the beegahs claimed by him. The Ameen who gave possession in the former suit, and the agent of Kaminee Dossee, both testify that the plots now in dispute are 2 of those in which, in respect of the rights of Shumboo, possession was given to the plaintiff in 1862. On being asked to point out the beegahs claimed by him, plaintiff's agent explained that he had no separate beegahs; that, in fact, he obtained undivided shares in the larger plots of which the boundaries were given, and this in now his case.

Defendants rather rest on the weakness of the plaintiff's case than on any evidence brought by them to rebut it. They say that the boundaries do not correspond with those of the plots bought by, and decreed to, plaintiff; that the possession given by the Ameen was a mere paper possession; and that he got no possession of these plots; that he has given no evidence to show his enjoyment of the disputed land during the year which elapsed between the execution of plaintiff's decree, and that of the defendant's decree. They do not attempt to suggest where the plots are, which plaintiff bought of Shumboo.

The Principal Sudder Ameen decided in favor of defendants, principally on the ground that the plaintiff could not point out the specific beegahs claimed by him, and that the boundaries of plot No. 2 did *not tally*.

As respects plot No. 1, we are quite satisfied that the boundaries sufficiently identify it as that in which the interests of Shumboo were decreed to and reported as delivered to plaintiff. With respect to plot No. 2, the boundaries in great part do not tally, and although plaintiff seeks to suggest that, while in one case certain lanes and roads are given as the boundaries, while in the other the lands immediately beyond the lanes are given, he has not (as he might have done) given any evidence sufficient to clear up this discrepancy. Nor has he given the evidence to his possession subsequent to his execution, which might have been expected to him.

Still, under all the circumstances, we think that plaintiff's claim is capable of the explanation that he really acquired the undivided share of the larger plots which have been mapped—an explanation which the Principal Sudder Ameen has failed to consider. As respects plot No. 1, looking to the identity of that plot which we consider to be established, to the fact that plaintiff had a clear decree for Shumboo's rights in that plot, to the absence (so far as we can see) of any obstacle to his executing his decree, to the report an

evidence that it *was* executed, and to the absence of any good counter-evidence for the defendants, we have no doubt that plaintiff did obtain possession in execution of an undivided share in that plot.

With respect to plot No. 2, notwithstanding the unexplained discrepancies in the boundaries, we have the positive evidence of the Ameen and the Gomashtah, that possession was given of a share in that plot as plot No. 2 of plaintiff's decree, and we have nothing which we think in any way sufficient to rebut that evidence. Looking, then, to the decision mentioned above respecting plot No. 1, and to the whole conduct of the parties, we are of opinion that in plot No. 2 also plaintiff obtained possession of the share of Shumboo as an undivided share.

It is not suggested or shewn that plaintiff, even if he obtained the property by execution in 1862, was ousted before the present dispute arose in 1863, and our finding is that plaintiff was in possession of Shumboo's rights in the disputed plots, and that he was improperly ejected by defendants under color of their decree.

There is an obscurity regarding the exact amount of Shumboo's share. But, as the defendants also come in under Shumboo, that cannot avail them. Plaintiff being in possession of Shumboo's rights, whatever they are, defendants are not entitled to interfere with that possession under color of a decree against a third party.

A question of some nicety has been raised with reference to the construction of Sections 230 and 231 of the Civil Procedure Code. It is argued that, under the latter Section, the decision is to be final and conclusive, and no fresh suit is to be entertained on the same cause of action between the parties; therefore that not only must the plaintiff show possession, but that, if he does, the question of title is to be entered into. In a suit brought as this is, under Section 230, we think that plaintiff's possession being proved, title also should be enquired into.

Looking, then, to title also, and throwing the *onus* on the defendants on whom it clearly falls, they being the dispossessors, we think that the defendants have made out no sufficient ground for ousting the plaintiff. Plot No. 1 is clearly the right of the plaintiff; and plot No. 2 is so far identified as that which plaintiff obtained under his decree, and clearly plot which he could obtain under the decree, that we think that defendants claiming under Shumboo have no title against him. Upon title also, then, our decision is final between the parties. We reverse the decision of the Court below, and decree plaintiff's claim with costs.

The 18th August 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges*.

Jurisdiction (Admission or rejection of)—Investigation of allegations and facts.

Case No. 1264 of 1865.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 1st February 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 18th August 1865.

Nusrun Beebee and others (Plaintiffs), *Appellants*,

versus

R. Watson and Co. (Defendants), *Respondents*.

Baboos Tarucknath Sein and *Sreenath Dass* for Appellants.

Messrs. R. T. Allan and *J. T. Rockfort* and *Baboo Onoocool Chunder Mookerjee* for Respondents.

A judicial investigation of allegations and facts sufficient to guide the Court should precede the admission or rejection of jurisdiction.

THE preliminary and admitted facts to be noticed in this case are these:—

Watson and Co. sued Lutafut Hossein and Ameena, his wife, for arrears of rent on a kubooleut executed by Lutafut. Ameena denied her liability under it. Ameena's mother, Nusseera, intervened in this case, and was made a party. No further appearance was made, and the decree was *ex parte* against Lutafut and Ameena. The next step was this last suit by Ameena and Nusseera to set aside the decree under Act X., and for a declaration of title.

The first Court gave plaintiffs a decree.

The Judge on appeal recorded that "this "suit should never have been admitted by "the Lower Court, as the last Court has no "jurisdiction;" that the Revenue Court in the Act X. suit had, however, to enquire into title-deeds and title; and that "an appeal "lies to the Judge where any question of "title has been determined, and, except in "the way of appeal, no Civil Court has "power to reverse a Collector's order. Last-

"ly, that, as respondent did not proceed un-
"der Section 58, Act X. of 1859, to have the
"order of the Revenue Court set aside, they
"had no remedy left."

The Judge, therefore, reversed the order of the Sudder Ameen as without jurisdiction.

The plaintiffs in that suit appeal here specially, and urge that the Judge should not have thus held that there was no jurisdiction till he had, by judicial investigation, fully gone into the facts which might be shewn to prove that jurisdiction did or did not lie with the Civil Courts, which he did not do.

We think this objection valid. The claim of the plaintiffs as made is certainly within the jurisdiction of the Civil Court. It may or it may not be that there is no good foundation for that claim in the Civil Courts in this case; but the appellants ought to have the facts, which they may wish to plead on the point, sufficiently investigated by the Appellate Court before it definitely pronounced that there was no cause of action.

A proper guide in reference to the taking jurisdiction will be found in the judgment recorded in page 101 of Marshall's Reports, Volume I., which rules that judicial investigation of allegations and facts is first to be made, and *then (but not before)* jurisdiction admitted or refused.

We accordingly remand this case to be retried with reference to these remarks.

The 18th August 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Registration—Proof of authenticity of deed of sale.

Case No. 1315 of 1865.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 2nd March 1865, affirming a decision passed by the 2nd Principal Sudder Ameen of that District, dated the 29th September 1864.

Srishteedhur Lushkur and others (Defendants), *Appellants,*

versus

Kala Chand Lushkur (Plaintiff), *Respondent.*

Baboo Kedarnath Chatterjee for Appellants.

Baboo Nubo Kishen Mookerjee for Respondent.

A deed of sale should not be deemed authentic merely from the fact of registration and production in other cases. Act XIX. of 1843 contemplates independent proof of the authenticity of the deed.

THE points pressed upon us in this case are that the deed of sale, upon which plaintiff put his case, was altogether unproved by evidence to its execution or to the transaction; that neither the plaintiff, nor Issur Chunder, nor Kanaye, nor any attesting witness, nor the witnesses present at the transaction, were examined; and that the due processes of law should have been had recourse to before the Judge could hold the deed of sale authentic, simply from the fact of registration and production in other cases.

We think this last objection valid, and take the occasion to remark that Act XIX. of 1843 clearly contemplates independent proof of the authenticity of the deed.

We, therefore, remand the case in order that the Judge may call on plaintiff to adduce the evidence above indicated, or such of it as may be sufficient, and then re-decide the point of the *authenticity* of the deed of sale.

Remand accordingly.

The 18th August 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Special Appeal—Grounds to be filed before hearing of Pleader.

Case No. 1038 of 1865.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Dacca, dated the 15th February 1865, affirming a decision passed by the Moonsiff of Naraingunge, dated the 29th July 1864.

Kishen Chunder Roy (Plaintiff), *Appellant,*

versus

Hurish Chunder Bose and others (Defendants), *Respondents.*

Baboo Nilmadhub Bose for Appellant.

Baboo Grish Chunder Ghose for Respondents.

An advocate or vakeel cannot be heard in support of an appeal in which no grounds have been filed.

THE grounds of special appeal in this case are filed by the appellant in person

but he does not himself appear to argue them. A vakeel appears for him, but, as there are no grounds certified by a vakeel or advocate of this Court upon which he can base his argument, we are of opinion that the rules of the Court prevent us from hearing him. It is a condition precedent to an advocate or vakeel being heard on behalf of a special appellant that some duly certified ground or grounds of appeal shall have been filed. This condition is not now satisfied, and the vakeel now declines to give his certificate to the grounds of appeal which have been filed by the appellant in person.

The appeal must, therefore, be dismissed with costs.

The 18th August 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Hindoo Minor—Loan by Guardian for Marriage expenses of.

Case No. 1293 of 1865.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 27th February 1865, affirming a decision passed by the Officiating Principal Sudder Ameen of that District, dated the 23rd September 1864.

Juggessur Sircar (one of the Defendants), *Appellant,*

versus

Nilambur Biswas (Plaintiff), *Respondent.*

Baboo Oomesh Chunder Banerjee for Appellant.

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Respondent.

The marriage of a Hindoo minor is a legitimate cause of expense in regard to which his guardian can bind him, unless it is shown that the amount of the loan was extravagant for the purpose, considering the social or pecuniary circumstances of the minor, or that it was not duly applied and expended.

This is a suit brought against the defendant to recover the amount of an alleged loan. The Lower Appellate Court finds that the money was borrowed by the authorized guardian of the defendant, while he was a minor, for the expenses of his marriage; and that he executed a bond to the plaintiff, setting out these facts, and purporting to bind the defendant in respect to the loan.

The Judge has decreed in favor of the plaintiff, and it is objected by the defendant in special appeal that he is wrong in doing so, because he had omitted to find either that the contract was for the benefit of the minor, or that the minor had ratified after he came of age. We think this objection untenable; the marriage of a Hindoo minor is a legitimate cause of expense, in regard to which his guardian has power to bind him. It is not pretended that the amount of the loan was extravagant for the purpose, considering the social and pecuniary circumstances of the minor, or that it was not duly applied and expended. We see no reason to interfere with the judgment of the Lower Appellate Court, and accordingly this appeal is dismissed with costs.

The 18th August 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Sale of under-tenures for arrears of rent—Rights of Auction-purchasers—Mortgages by defaulting under-tenants.

Case No. 1017 of 1865.

Special Appeal from a decision passed by the Judge of Mymensing, dated the 20th January 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 26th August 1864.

Kalee Kant Chowdhry (Defendant), *Appellant,*

versus

Rumonee Kant Bhuttacharjee (Plaintiff), *Respondent.*

Baboo Otool Chunder Mookerjee for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

A mortgage created by a defaulting under-tenant on account of a debt contracted by him cannot continue to the prejudice of the auction-purchasers of the tenure sold for arrears of rent under Section 105, Act X. of 1859.

In this case the special appellant is the zemindar defendant. The facts of the case are these: Within the defendant's zemindary was a shikmee talook in the possession of Fukeer Chunder Roy, talookdar. The talookdar borrowed money from the zemindar, and pledged his talook as security. He failed to pay rent, and the zemindar sold the tenure under the provisions of Section 105, Act X. of 1859, and the auction-purchaser took possession. The zemindar then brought a suit to recover the amount of the loan, and got a money-decree, and sought to enforce his lien by putting up the talook for sale. The auction-purchaser objected,

but his objection was over-ruled, and the present suit is to set aside that order.

It is contended by the defendant zemindar that the sale of the tenure for arrears of rent did not relieve it of the burden put upon it by the talookdar; that a sale under Regulation VIII. of 1835 is only a sale of rights and interests, such as the defaulter has at the time of the sale, as ruled in the decision of the late Sudder Court in 1851 (p. 626), and again by this Court in 1863 (*see* Hay's Reports, p. 502), and again in 1864 (Vol. I., Weekly Reporter, December 3rd, p. 256). It is urged that such a sale is not like a sale held under Regulation VIII., 1819, where the property sold goes into the hands of the auction-purchaser disencumbered of all liabilities and engagements imposed upon it by the former proprietor.

There is no dispute in this case that the *tenure* was sold for arrears of rent. By the sale of the tenure we understand that all the rights and interests of the tenant, and of any co-sharers, if there were any, were sold, and any interest in the estate by which the defaulter might be benefited directly or indirectly, such as this mortgage, became extinguished. Whether, by the sale of the tenure, the engagements with under-tenants become cancelled, is not a question before us, so that we shall express no opinion opposed to that of the decision of 1851, on which the defendant, special appellant, has so much relied. All we say is that every right and interest, which the defaulter had, or whereby he might be benefited, were, by the sale of the tenure, extinguished; and that the mortgage created by the defaulter on account of a debt contracted by him cannot continue to the prejudice of the auction-purchaser. We think it unnecessary to note the arguments urged by the respondent. We affirm the orders of the Courts below, and dismiss the appeal with costs.

The 19th August 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Embankments (Right of making).

Case No. 1092 of 1865.

Special Appeal from a decision passed by the Judge of Patna, dated the 25th January 1865, reversing a decision passed by the Moonsiff of that District, dated the 22nd September 1864.

Sheikh Monoour Hossein and others (Plaintiffs), *Appellants,*

versus

Kanhya Lal and others (Defendants), *Respondents.*

Messrs. C. Gregory and *J. T. Rochfort* for Appellants.

Baboo Kishen Succa Mookerjee for Respondents.

A riparian proprietor may deal with the stream as freely as with any other portion of his land, provided only that he must not, by so doing, sensibly disturb the natural conditions of the stream as it exists within the limits of other proprietors, whether above or below, or on the opposite side.

It appears that the plaintiff in this case, before suit, had made a dam or weir across a certain Nullah for the purpose of laterally diverting some of the water of the Nullah into his own land. The defendants are landowners higher up the stream, who, considering themselves injured by the erection of the plaintiff's dam, entered upon plaintiff's land, and cut or broke down the dam. Upon this the plaintiffs charged the defendants before the Magistrate with having committed malicious mischief; but the Magistrate dismissed the complaint, on the ground that the defendants had made out some show of right for their act. The plaintiffs then brought the present suit, which, in effect, complains of the defendants' trespass, and asks to have it declared, as against the defendants, that the plaintiff has a right to make the dam on his own land, and to take by means thereof the water from the Nullah for the purpose of irrigating his crops. The Court of first instance gave a decree in favor of the plaintiff; but this was reversed by the Lower Appellate Court. The Lower Appellate Court found that the "natural and customary outlet "for the excess waters of the Luhsona reservoir, known as 'Ahur Kurpasaree,' is by the "contested Nullah." It is also said: "There "is no dispute as to the fact that that Nullah "is in the plaintiff's estate, and so much of his "claim is unnecessary. As to the rest, he has "no right, by erecting or removing any bund, "either to cause the waters of the Luhsona "reservoir to be restrained or to flow out; nor "has he any right to prevent the Luhsona "proprietors from regulating the discharge "at their own pleasure, and consequently his "suit fails entirely."

Against this decision, the plaintiff appeals specially; and we are of opinion that the judgment of the Lower Appellate Court does not disclose any legal grounds for the deter-

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mination arrived at. It is conceded that the Nullah in question is a natural water-course; and that the spot where the plaintiff dealt with it by making a bund is entirely within his own land. Now, the right of a proprietor of land, which borders on, and includes part of, a natural stream, is in India co-extensive with that of a proprietor similarly situated in other countries which have been guided by the civil law in these respects. The governing rule is laid down in the Sudder Decisions to be found at page 1324 of the Volume for 1857, and page 301 of Volume II. for 1860. It may be concisely stated as follows: The riparian proprietor may deal with the stream as freely as with any other portion of his land, provided only that he must not, by so doing, sensibly disturb the natural conditions of the stream as it exists within the limits of other proprietors, whether above or below, or on the opposite side.

Therefore, in the case before us, the plaintiff has undoubtedly, as against the defendants who are upper-proprietors, the right to make the bund, and thereby to take water for irrigation; and *primâ facie* the breaking down the bund by the defendants is a gross act of trespass. It may be, however, that the defendants are entitled to the judgment of the Court; but, if so, it must be on one of the two following grounds only, *viz.* :—

1. That they had by some means acquired, as against the plaintiff, the easement of being entitled to "regulate the discharge at their own pleasure" of the Luhsona revervoir; and that the plaintiff's bund interfered with the proper exercise of this right.

2. Or that the plaintiff's bund at the time of the defendants' trespass was either actually producing, or was on the point of producing, as a necessary result, such a disturbance of the natural conditions of the stream abreast of the defendants' land as entitled them, either forcibly to abate the nuisance, or to bring a suit to compel its removal.

We cannot discover that the Judge has inquired into, and come to, a judicial determination relative to the existence of either of these sets of facts. We, therefore, remand the case that he may do so; the plaintiff to be at liberty, in meeting the second of the above two issues, to show, if he can, that the disturbance, if any, of the natural conditions abreast of the defendants' land effected by the action of his bund is covered by acquired right on his part.

The case is remanded according to the above remarks.

The 19th August 1865.

Present:

The Hon'ble H. V. Bayley and G. Campbell, *Judges.*

Evidence (Moonsiff's report of local investigation)—Alluvial lands.

Case No. 190 of 1864.

Regular Appeal from a decision passed by Baboo Nobin Kisto Pauleet, Principal Sudder Ameen of Backergunge, dated the 19th August 1863.

Mr. G. P. Wise and others (Defendants), *Appellants,*

versus

Ameeroonnissa Chatoon and another (Plaintiffs), *Respondents.*

Mr. R. T. Allan and *Baboo Onocool Chunder Mookerjee* for Appellants.

Baboos Grija Sunker Mojoomdar and *Romesh Chunder Mitter* for Respondents.

A Moonsiff's report of a local investigation, when not shown to be substantially erroneous in its data or reasoning, should convey the greatest weight as evidence of the facts it sets forth.

The fact that, under certain circumstances, a river is, in some places, and at extreme time of low water, capable of being crossed, does not warrant the presumption that the river was a fordable stream at the time of the formation of the chur.

A FULL report of this case, decided 27th January, will be found at page 132 of the Weekly Reporter for the month of March 1865, No. 7.

Our remand order was in these terms:

"On the whole, we think that the case "should be remanded for re-trial on these "issues:—

"*1st.* Whether on the west side, and to "what extent in a westerly direction, plaintiff "is entitled to the disputed land under Clause "1 or Clause 3, Section 4, Regulation XI. "of 1825?

"*2nd.* Whether on the north side, and "to what extent in a westerly direction, "plaintiff is entitled to the disputed land as "under Clause 1 or Clause 3, Section 4, Re-"gulation XI. of 1825?

"The nearest Moonsiff will be deputed "to make a report on the locality as to these "issues."

This order has been carried out. We cite so much of the Judge's remarks as touch the points which have to be considered in our judgment on this appeal—

"On the spot the land marked *B* in the "map was acknowledged by both parties

"to be the land decreed to the defendant "(Wise) in the Act IV. case; and that is "now acknowledged before me. Then, "again, the Moonsiff reports with much "truth that the plaint sets forth that the "disputed land is bounded on the north by "Sahibrampore; and that, therefore, the plot "marked *A* cannot be included in the dis-"puted lands. The plaintiff, however, still "claims this plot *A*, but does not explain "this statement in the plaint about the "boundary. If this plot *A* had really been "originally claimed by the plaintiff, the "boundary would have been described as "the khâl on the north, and to the north "of that again the *decreed chur;* but, "under the description in the plaint, I "must hold that *A* is not included in the "plaintiff's claim."

In regard to plot *E* of the Moonsiff's map, the Judge records: "Now, the best "evidence which the plaintiff could have "given would *have been* the decree *under* "*which he states* he obtained this land *E*, "but THIS decree *is not forthcoming;* a "decree of 1799 is certainly produced, but "that is not the decree under which this "land is stated to have been obtained, and "that decree only shows that *Koyaria* di-"luviated; and that there were re-forma-"tions or accretions on the northern bank "of the river; but there is nothing to show "that this plot marked *E* forms part of "that reformation, or part of the land which "was *decreed.*"

Even if *E* belonged to plaintiff, the Judge lays down that the canal going west from east by plot *E* must be shown to have been fordable at the time of the formation.

As to plots *A*, *C*, *D*, the Judge holds on the whole evidence, but especially with reference to the Police Map of 1860, that the plots are parts of defendant's (Wise's) land, and accreted to the plot *B* awarded to him under Act IV. of 1840 as chur *Sahibrampore.*

In this case we have heard the whole of the Moonsiff's Report of his local investigation. He seems to have taken much pains in conducting that investigation, and we are, in fact, shown no grounds, as far as the Moonsiff's conduct is concerned, for not accepting it.

The late Sudder Court held that the reports of local investigations, made under such circumstances as these, are not to be lightly disregarded.

We would not, on the one hand, bind ourselves absolutely to accept any officer's report of a local investigation; but we quite concur in the view that such a report, when made as this has been, and not clearly shown to be substantially erroneous in its data or reasoning, should carry the very greatest weight as evidence of the facts it sets forth.

We now proceed to consider the claims and rights of the respective parties in regard to the plots *A*, *C*, *D*, and *E*, with reference to the main principles upon which we shall decide this appeal.

We think the Judge has erred in taking the narrow technical ground that *A* was not specifically claimed by plaintiff.

In fact *A* (just as much as *D*) was claimed, because both equally lie to the south of the Dhone, and to the north of the Arial River, which prescribe on *these* sides the *lines* of contention, as the canal to the west near E, and the chur Sahibrampore to the east, do so in THOSE directions.

As to the plots *A* and *D*, the canal dividing them from *E* is clearly a navigable channel; and, therefore, putting that aside, the whole question turns, in fact, on whether the Dhone to the north was a fordable Dhone or not when the lands were formed.

It is argued that the former state of the Dhone, and not the present, is to be regarded in respect to its non-fordable character then, and the analogy of Act X. of 1847 is referred to.

But, if we are to look to any such analogy, we may remark that, since our decision before cited, it has been finally ruled that the state of things at the time of re-survey must be looked to, and not that at the time when the land first appeared out of the water, as determining the question of the *status* of land.

This argument, however, has no bearing on this case, which is not one of the operation of the special law of re-survey.

After careful consideration of the Moonsiff's reports, we consider it not to be proved in any way that the Dhone to the north of *A D* was in reality a fordable stream at the time of the formation of the chur.

It is urged that the Moonsiff reports that, under certain circumstances, the Dhone is in some places, and at extreme times of low water, capable of being crossed.

On this point our view perhaps will be best conveyed in the terms used in the case of Gour Churn Doss, decided on the 21st June 1865, and published in page 94, Volume III., of the Weekly Reporter of this Court—

"It is argued that, if, even in this way, a person can get across, it is a fordable stream, and defendant can claim the land under the words of Regulation XI. of 1825. The construction of a law must, however, in our mind, be reasonable, or, to use the words of Dwarris on Statutes, page 530, edition 1848, to construe the words according to the subject-matter in such a sense as to produce a reasonable effect, and with reference to the circumstances of the particular transaction."

And at any rate we certainly do not think that the present state of the Dhone scarcely fordable now raises any presumption that it was fordable at the time of the accretion.

No other substantial proof on this point is pressed on us, and we are clearly of opinion that, substantially, the Moonsiff finds that the Dhone was not fordable at the time of the accretion in the sense of the word as referring to a general state of the Dhone, and not to an exceptional and extreme one.

In this view we think that plots *A* and *D* of the Moonsiff's map should be awarded to defendant.

Plot C.—Plaintiff claims this plot *C* as part of *D*, and defendant claims it as part of *D* awarded to him under Act IV. of 1840. The Moonsiff's report and the position of the land indicate it to belong to *B*. But, even if it did not, *C* would, under our ruling above given as to *A* and *B*, not attach to plaintiff's land, but go to defendant with *A*.

As respects the claim to the lands as accretions to plot *E*, we may add that we are not shown the decree under which plot *E* is claimed, or any other satisfactory evidence to prove that *E* is part of plaintiff's "*decreed chur*," as she alleges; and, if it were, it is separated from it, and by a navigable channel.

On the whole case, then, we see no reason to admit plaintiff's objections to the Moonsiff's report, and we dismiss plaintiff's claim to plots marked *A*, *C*, and *D* on the Moonsiff's map of 1865, with costs.

The 19th August 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Benamee Sales in fraud of creditors—Representatives of, or private purchasers from, original defaulters.

Case No. 1018 of 1865.

Special Appeal from a decision passed by the Officiating Judge of Cuttack, dated the 24th December 1864, reversing a decision passed by the Sudder Ameen of that District, dated the 18th September 1862.

Purikheet Sahoo (Defendant), *Appellant,*

versus

Radha Kishen Sahoo and others (Plaintiffs), *Respondents.*

Baboo Oopendur Chunder Bose for Appellant.

Mr. R. T. Allan for Respondents.

The representatives of, or private purchasers from, a party selling benamee in fraud of creditors, or pleading such a sale in order to recover the property afterwards, are bound equally with the original defaulters, and cannot take advantage of what must be held to be their own wrong.

THIS was a suit by the special respondent, who is the representative by purchase of the original claimants, the sons of Sridhur Sonkra, to recover possession of certain lands held by the defendant, on the ground that the conveyance by their father Sridhur to the defendant was a benamee one made in fraud of creditors. The plaintiff added that the sons of Sridhur retained possession themselves of the property till 1853, three years after the alleged sale to the defendant, when they were ousted by him.

The defendant (special appellant before us) replied that the sale was a valid one, made for a valuable consideration of 300 rupees: and that, in any case, the plaintiff could not plead that the sale was benamee in fraud of creditors, and so take advantage of his own fraud.

Both Lower Courts decided in the first instance against the plaintiff's claim; but, on special appeal to this Court, the case was remanded (7th July 1864), with directions to consider the effect of an alleged admission of the defendant found on the record, and which was that the property was in reality Sridhur's long after the date of the supposed sale.

The Judge has now found that this admission is fatal to the defendant's claim, and has given a decree to the plaintiff.

It is urged specially that, even granting the admission to be full and unequivocal, the special respondent cannot take advantage of it, as he is bound by the statement of the party he represents that the sale to Purikheet was a fictitious one in fraud of creditors.

We agree with the Judge that the words of the admission are clear and unmistakeable, and, had the special respondent any starting point for his case, would inevitably

turn it in his favor. But the special respondent comes into Court on an illegal footing, and seeks to recover the property in dispute by taking advantage of a fraud heretofore practised by Sridhur to cheat his creditors. Had this point been brought before the Divisional Bench that originally heard the appeal, there would have been no remand: for, however weak the special appellant's title may be, the special respondent has no *locus standi* at all, and cannot now obtain, by an action at law, a remedy for his predecessor's bad faith.

It was contended in the course of the argument that, as, by Purikheet's admission, public notice was given that, although standing in that person's name, the property really belonged to Sridhur, the former must be considered as Sridhur's trustee, and that no fraud was committed.

We fail to see the cogency of this reasoning. In the first place, it was not publicly known at that time that the land stood in Purikheet's name at all; and, even had it been so, that fact could not have altered the character of the transaction, or have made the one person a trustee for the other.

For the rest, the law on the subject has been stated in a decision of this Court (3 Weekly Reporter, 21st June 1865, page 92), and we concur generally in that ruling, which lays it down that even the representatives of, or private purchasers from, a party selling benamee in fraud of creditors, or pleading such a sale in order to recover the property afterwards, are bound equally with the original defrauders, and cannot take advantage of what must be held to be their own wrong.

Taking this view of the case, we reverse the decision of the Judge, and dismiss the special respondent's suit with costs.

The 19th August 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Ejectment of bona fide lessee by auction-purchaser—Mesne-profits.

Cases Nos. 1150 and 1411 of 1865.

Special Appeals from a decision passed by the Judge of Shahabad, dated the 13th February 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 12th June 1863.

Teknarain Singh (Plaintiff), *Appellant,*

versus

Dewan Ameer Ali Khan and others (Defendants), *Respondents.*

Baboos Kishen Succa Mookerjee, Kalee Mohun Doss, and *Dwarkanath Mitter* for Appellant.

Baboos Onoocool Chunder Mookerjee, Unnoda Pershad Banerjee, Chunder Madhub Ghose, and *Mohesh Chunder Chowdhry* for Respondents.

A *bonâ fide* lessee from a party actually in possession as zemindar is entitled to recover mesne-profits for the unexpired period of his lease on being evicted by the auction-purchaser in execution of a decree.

On 10th July 1855, the plaintiff obtained a ticca lease for seven years from Ram Phul Pandey of a 12 annas share of Mouzah Pandapore. It appears that, in 1845, Ram Phul Pandey, in order to defeat creditors, as he now says, sold his rights and interests to Mohadeo Dutt, but, as found by the Judge, continued in possession. Some time in 1861, the property was put up for sale for the realization of a fine of 25 rupees imposed on Mohadeo Dutt, and was purchased by the defendants who proceeded to take possession, and finding the plaintiff, lessee from Ram Phul, in possession, ousted him. The plaintiff brings the present suit to recover mesne-profits for the period he was dispossessed. He does not seek possession, as the period of his lease has expired. The question is, whether plaintiff, holding a lease from Ram Phul, the party in actual possession, who had heretofore ostensibly, at least, sold his rights and interests to Mohadeo Dutt, is entitled to claim mesne-profits from the defendant, auction-purchaser, of the rights and interests of Mohadeo Dutt, who evicted him before the expiry of his lease. A great deal has been said about Ram Phul's conduct, and that he cannot take advantage of his own wrong-doing; and certain decisions of the late Sudder Court and of this Court, with which we quite concur, have been quoted to us. But we think we may, in this case, quite put aside all enquiry as to the nature of the sale between Ram Phul and Mohadeo Dutt: for Ram Phul in this case is not trying to take advantage of his own wrong-doing, and has nothing to do with the suit. What we have to determine is whether the plaintiff, a *bonâ fide* lessee from Ram Phul, is

entitled to recover mesne-profits for the unexpired period of his lease, he having been forcibly evicted by the auction-purchasers. It is not shewn us that plaintiff is other than a *bonâ fide* lessee. He found Ram Phul in possession, holding as zemindar, and appears to have taken a lease from him in good faith. He entered into and enjoyed possession for the greater period of his lease. He does not appear to have had any knowledge of Ram Phul's transactions with Mohadeo Dutt. The Judge has found that Ram Phul continued in possession, so that, if the sale to Mohadeo Dutt was a real sale, Mohadeo must have left the property in Ram Phul's hands as his agent or trustee, and have stood by without raising any objection when Ram Phul gave a lease to the plaintiff. Looking at the transaction between the plaintiff and Ram Phul as made in good faith, Ram Phul being in possession, we think that plaintiff should not have been disturbed till his lease had expired; and, as the defendants have evicted him, we consider them liable for mesne-profits. The appeal is dismissed with costs.

The 19th August 1865.

Present :

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Dissolution of partnership (proof of)—Judgment of High Court.

Case No. 163 of 1865.

Regular Appeal from a decision passed by the Judge of Sarun, dated the 5th April 1865.

Phulram and others (Defendants), *Appellants,*

versus

Jubuttee Koer, guardian of Mohabir and Rajchunder Pershad, minors (Plaintiff), *Respondent.*

Mr. *R. T. Allan* and *Baboos Dwarkanath Mitter, Unnoda Pershad Banerjee,* and *Ram Gopal Ghose* for Appellant.

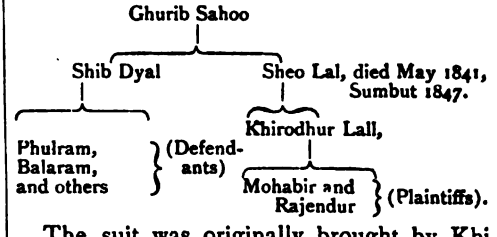
Baboos Onoocool Chunder Mookerjee and *Kalee Kishen Sein* for Respondent.

Suit for shares of assets and property of a trading firm in Behar; defendants pleading dissolution of partnership. HELD that, in such trading cases, evidence that some members of a joint firm at some time traded on their own and sole account is not material; but the books of the firm should be produced, and evidence of a formal and complete dissolution adduced.

A former judgment of the High Court is not to be impugned, or the question then at issue re-opened on any ground, either of additional evidence, or of the Court on the last occasion having failed to do justice, or on the expediency of the High Court doing justice (supposing there to have been a failure of the same) at the 11th hour. If the former judgment came to a wrong conclusion on the original evidence, the Privy Council is the proper tribunal to have recourse to.

THIS case was remanded by a Bench of this Court (Justices W. S. Seton-Karr and E. P. Levinge) on the 24th of March 1863, and it is necessary to state the particulars of the case and of the order of remand, because on the intent and proper interpretation of that order the whole of the present appeal turns.

The position of the contending parties before us, as regards family, is as follows :—



The suit was originally brought by Khirodhur Lal, the father of the plaintiffs, to recover his share in the trading assets and property of the firm of Shib Dyal and Shib Lal, which he alleged was joint and undivided in business. The firm was described as carrying on an extensive business in sugar, saltpetre, salt, cloth, &c. The defendants put in a long reply to the action which was instituted previous to the present Civil Code (Act VIII. of 1859), declaring that the partnership was dissolved in the year 1840; that the father of Khirodhur, who is the grandfather of the minors, then received his due share of the assets; that the father of the defendant traded separately and on his own account ever since; and that the plaintiff had no ground of action.

The plaintiff, as he had an undoubted legal right to do, put the defendants to the proof of their dissolution of partnership, and the Judge of the Zillah Court, finding the evidence to be contradictory and conflicting, finally declared in favour of the defendant, *on the balance of evidence,* which he thought on the whole made out their case. The Judge, it is to be observed, remarked that the defendants neglected to produce any of their books, but said that allegations made in Court by the plaintiff showed that he had admitted trading on his own account, and that, in the face of such admissions, a

decree in his favour would not be justifiable, although, but for these admissions, the weight of evidence preponderated on the plaintiff's side.

On appeal, the High Court, on the date alluded to, deliberately reversed this finding, observing that the defendants produced "no "direct evidence to the winding up of the "firm, and that they did not account for the "non-production of the books up to the date "of the alleged separation." The Court further remarked that "legal proceedings "were taken in the name of the firm long "after the alleged separation, at a time "when the plaintiff was not more than 10 or "12 years of age." For the above and other reasons, the High Court concluded that the defendants had failed to satisfy them that the firm was duly dissolved, and the partnership accounts wound up and adjusted; and the Court remanded the case for further investigation, on the ground *that the firm is still subsisting*, and directed the Lower Court to take an account of the partnership, as it subsisted in the year 1840, with its debts and liabilities, and to decide to what share of profits and produce the plaintiff was entitled, &c. (see the concluding part of the judgment).

On this the present Judge of the Lower Court appointed Assessors to examine the accounts. The persons sat for a fortnight, and examined the accounts of 25 years, finding in the end that, on the 9th of February 1840, the assets of the firm consisted of 7,61,731 rupees, of which the plaintiff would be entitled to one-half; while up to the 9th of October 1864 the profits had swelled to 2,51,188, &c., of which the plaintiff again would be entitled to one-half.

The appeal is now brought to endeavour to convince us that the Judge has misinterpreted the order of remand; and that the defendants have now proved that the firm separated in 1840 as originally contended, and that the father of the plaintiff conducted a separate business ever since. The above grounds, which are taken in writing in no less than four different heads, with diversity of expressions, have been further supported by the arguments of Mr. Allan.

We are perfectly clear that it is out of the question for us to admit the appeal to hearing on any such grounds. This point was the very point decided, after a full and patient hearing, by the Bench on the last occasion, and it is utterly impossible that we should allow that judgment to be impugned, or the same, as was then at issue, question to be re-opened, on any grounds either of additional evidence, or of the Court on the last occasion having failed to do justice, or of the expediency of the High Court's doing justice, supposing there to have been a failure of the same, at the eleventh hour. We cannot lay any stress on any expression in the order of remand, that there possibly might have been a "partial settlement" at any time previous to the death of the father (Shib Lal). That expression in no way affects or alters the substance of the judgment, and certainly no evidence to any partial adjustment of profits has been produced. All the fresh evidence tendered points to the old issue, *i. e.*, the absolute dissolution of partnership and cessation of the joint firm in 1840.

But any additional evidence brought by the defendants to prove that the firm separated in 1840 cannot now be looked at. The defendants, on the former occasion, were not taken by surprise. They knew the extent and character of the plaintiff's claim. They knew, further, that the *onus* was on them to prove formal separation; and, while the plaintiff had been a minor, they had the whole of the books and accounts in their own possession. It was on their refusal to produce the best evidence that the High Court mainly grounded its reversal of the Lower Court's decree; and any evidence of books and accounts now for the first time put into Court, or any oral evidence since discovered and produced, even if it could be received and looked at, would be exposed to the very greatest suspicion. In these trading cases, which are common in the province of Behar, it constantly happens that there is evidence, *apparently* showing that members of a joint firm have, at some time, traded also on their own and sole account; but what must decide all such suits are the books of the firm, and the evidence to a formal and complete dissolution.

On the record as it stood, Mr. Justice Seton-Karr, who sat on the original trial, has no doubt that the Bench of the Court in 1863 came to a perfectly just and proper conclusion. But, even if we now, as a Bench of two Judges, entertained any doubts on this subject, we ought never, on the additional evidence now for the first time produced, to be led away by Mr. Allan's plausible but fallacious argument of doing justice, even at the eleventh hour, as the highest tribunal in this country.

If there has been a wrong conclusion on the original evidence as to the existence of the firm, which we by no means say, the

Privy Council is the proper tribunal for the appellants to have recourse to.

With regard to the Judge's order on the Assessor's report, which is founded on the books of the firm, we have only to say that it seems to us right *in the main*. No exception is taken, or can be taken, by the defendants to their own books; and, as for the allegation that the plaintiff did not produce his own books when called for, we hold the plea to be of no effect. The plaintiff was a minor when his father died, and his case all along has been that the books and accounts were wholly in the possession of the defendants.

We find, then, the assets of the firm in October 1840 to be Rs. 2,51,183-10-9 as follows:—

	Rs.	A.	P.
Landed Property ...	1,75,362	8	1
Merchandise and Trade	67,412	13	1
Cash balance	8,413	5	3

To one-half of the above the plaintiff is to be considered entitled, or, in all, to Rs. 1,25,594-5-4½.

We think, however, that the plaintiff cannot get the above sum, and, in addition, that of Rs. 38,305, or the one-half of the assets as they stood in 1840. The books show that the latter sum was never withdrawn by the father of Khirodhur, and it must be held, therefore, to have remained as part of the trading capital, and to have merged in the present profits and assets of the firm as they stood in October 1864. We are not quite sure of the intent of the Judge in this part of his order, but we have thought it right to explain it as above.

Neither can we allow any interest on the half share of Rs. 67,412, which consists of merchandise, outstanding balances, &c. But, with the above modification and explanation, the decree of the Lower Court is affirmed, and the appeal dismissed with all costs. The plaintiff has a right to have his name registered as to his share of the real property.

The 21st August 1865.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges*.

Limitation—Pre-emption suits.

Case No. 1214 of 1865.

Special Appeal from a decision passed by the Judge of Patna, dated the 23rd January 1865, affirming a decision passed by the Principal Suddr Ameen of that District, dated the 7th August 1864.

Bechun (Plaintiff), *Appellant*,

versus

Mahomed Yakoob Khan and others (Defendants), *Respondents*.

Baboo Kishen Succa Mookerjee and *Moulvie Syed Murhamut Hossein* for Appellant.

Mr. C. Gregory for Respondents.

Clause 1, Section 1, Act XIV. of 1859 (limiting a pre-emption suit to one year from the time of the purchaser taking possession under the impeached sale), is applicable where the purchaser is opposed in obtaining possession by the vendor or some other person asserting an adverse title, but not where the vendor does not oppose, and the party opposing the *khas* possession of the purchaser is a mere farmer claiming to pay the same rent to the purchaser which he had paid to the vendor before the sale.

The Court of first instance tried the case on the merits, and dismissed it on the ground that the evidence of the witnesses of the plaintiff in support of her statements, regarding her performing the necessary formalities before this suit was brought, was incredible.

The Lower Appellate Court was of opinion that Clause 1, Section 1 of Act XIV. of 1859, does not authorize that a claimant of pre-emption may stand by, while the purchaser of the sale impeached may have occasion to sue others for possession, and till litigation ends in the highest Court of the country. Where the purchaser is opposed in obtaining possession by the vendor or some other person, asserting an adverse title, and so may not have acquired any sort of possession of the property sold, the Law of Limitation may be quoted to show that the claimant for pre-emption is required to sue only within one year of the purchaser's *taking* possession under the sale impeached. In a case, however, where the seller does not oppose, and the party opposing the *khas* possession of the purchaser is a mere farmer, who only claims to pay certain rent to the purchaser, which, he says, he was paying to the vendor before the sale, it cannot be said that, until the objections of the farmer, or a such like person, are finally settled, the purchaser has no legal possession. The purchaser may have, when suing for setting aside the farm, sued for possession; but it is only the form of possession, and not the fact of the purchaser's possession, that can legally be in dispute in such a case. In the case cited by the special appellant (6th of January 1865, page 5, Weekly Reporter), the pur-

chaser was opposed by a party who pleaded that the purchaser had no right to take possession at all, unless certain debts, due from the vendor in consideration of which the objector said he was in possession, were paid off by the purchaser. In such a case, where there is no possession, the purchaser of the right of a claimant to sue for pre-emption may be delayed to a year from the date of the purchaser's obtaining possession under a final decree of the highest Court in the country, or within a year from the said purchaser obtaining possession out of Court by paying off the encumbrance.

The Lower Appellate Court has, however, put an end to the case of the special appellant by stating that, "even if she has a right of action, I disbelieve the evidence produced by her." By this sentence, the Lower Appellate Court means to uphold the decision of the Court of first instance on the merits passed against the claim of the special appellant.

We accordingly see no reason to interfere, and dismiss the special appeal with costs.

The 21st August 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Limitation—Title—Separate adjudication.

Cases Nos. 1021, 1055, and 1056 of 1865.

Special Appeals from a decision passed by the Additional Principal Sudder Ameen of Dacca, dated the 19th January 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 28th April 1863.

Umbika Soonduree Dossee (Defendant), *Appellant,*

versus

Mr. W. Woodin and others (Plaintiffs), *Respondents.*

Mr. G. C. Paul and *Baboos Hem Chunder Banerjee* and *Motee Lal Mookerjee* for Appellant.

Baboos Sreenath Doss and *Greeja Sunker Mojoomdar* for Respondents.

The issues of limitation and title should be tried separately, and not mixed up together.

THESE were cases of disputed boundary, in which the defendant set up, amongst other pleas, an adverse possession for more than 12 years.

The Principal Sudder Ameen considered that it was impossible to separate the issues of limitation and title, and so tried them together, finding on the merits for the plaintiff.

It is contended in special appeal that it was improper to mix up the two issues, inasmuch as, however good the special respondents' title might have been at one time, he might, by neglecting to enforce it, have suffered it to lapse, and that, therefore, a decision on the merits could not include the plea of limitation. Mr. Paul, for the special appellant, quoted a decision of the Privy Council (Volume VIII., Moore's Indian Appeals, page 200) in support of his position.

We think that the case must go back in order that the issue of limitation may be properly tried. The two questions were not mixed up together, so that a decision on the one was impossible without adjudicating on the other at the same time; and the special appellant had the right to prove, if he could, a superior title, *viz.*, one of adverse possession for more than 12 years to that of the party claiming to oust him.

If the Principal Sudder Ameen decides the question of limitation adversely to the special appellant, he will then go into the merits, and, if he does so, will give his reasons for whatever decision he may come to. In the present case, he has given a lengthy recital of the statements of either party, but has given no reasons for agreeing with the one in preference to the other.

Costs will follow the result.

The 21st August 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Hindoo Law—Gifts of ancestral property without son's consent.

Case No. 1142 of 1865.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 9th February 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 27th June 1864.

Huro Lal Chowdhry (one of the Defendants), *Appellant,*

versus

Kripa Moyee Debee and others (Plaintiffs), *Respondents.*

Mr. J. S. Rochfort and *Baboo Bungshee Dhur Sein* for Appellant.

Baboos Sreenath Doss and *Mohinee Mohun Roy* for Respondents.

A gift of ancestral property by a Hindoo who has sons without their consent is valid.

THIS was a suit to set aside an execution-sale, and to recover possession of the property which the plaintiffs alleged had been made over by deed of gift to them by their husbands on 21st Cheyt 1256. The Judge reversed the order of the first Court, holding that there was nothing in the Hindoo Law prohibitory of such gift even in the presence of sons; that in this transaction no fraud was alleged; that the parties were apparently solvent when they made the gift; and that their subsequent acts proved the reality of the gift.

Mr. Rochfort, pleader for the special appellant, took up the law-point. He also wished to enter into the evidence, and stated that the Judge had no grounds for coming to the conclusion that the gift was a valid one.

On the law-point, we see no grounds for differing from the opinion expressed by the Judge. If we require any precedent, we have only to turn to the opinion of the whole of the Judges of the late Sudder Court, expressed in their letter to the Judges of the Supreme Court, bearing date 2nd September 1831. They then held unanimously that a Hindoo who has sons can sell, give, or pledge, without their consent, immoveable ancestral property situate in the Province of Bengal; and that, without the consent of the sons, he can by will prevent, alter, or affect, the succession to such property. We dismiss this appeal with costs.

The 22nd August 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Jurisdiction (of Civil Courts)—Suit for declaration of title as Lakherajdar after decree for arrears of rent under a Kubooleut.

Case No. 1157 of 1865.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 15th March 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 9th August 1864.

Tara Chand Mytee and another (Plaintiffs), *Appellants,*

versus

Nilambur Mundul and others (Defendants), *Respondents.*

Baboo Gopeenath Mookerjee for Appellants.

Baboo Hem Chunder Banerjee for Respondents.

A decree of a Revenue Court awarding arrears of rent for a certain year under a kubooleut against a ryot does not bar the jurisdiction of the Civil Courts in a suit brought by him for a declaration of his title as lakherajdar in the same land.

THIS is a suit for a declaration of the plaintiff's title as lakherajdar in certain lands, which title, he alleges, has been brought to jeopardy by a decree having been awarded against him for arrears of rent under a kubooleut referring to the land. The Judge has held that, as the issue, whether this land was lakheraj or not, was decided by the Revenue Authorities, who were a competent Court to try the question, their decision was final and conclusive. This is objected to on special appeal. We do not concur with the learned Judge of the Lower Court. The Revenue Authorities may have been a competent Court to try the issue in question in order to determine whether the kubooleut was given, and the rent was to be decreed or not. But it does not follow that their ruling on the issue is final, and that such a question cannot be re-opened before a Civil Court. The suit of the plaintiff, as now brought, is not upon the same cause of action as the suit of the plaintiff in the rent-suit. The decision of the Collector, as respects the payment of rent for the year for which it has been awarded, may be final. But the plaintiff now raises the general question, whether he is entitled to hold rent-free or not. The Judge must decide this question, and the case is remanded to him for that purpose. Costs to follow the final result in the case.

The 22nd August 1865.

Present :

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Suit upon Bill of Sale—Interest (on money under attachment with Collector).

Case No. 382 of 1865.

Special Appeal from a decision passed by Mr. W. H. Brodhurst, Judge of Sarun, dated the 13th December 1864, reversing the decision of the Principal Sudder Ameen of that District, dated the 28th May 1858.

Rajah Saheb Purhlad Sein and others (Defendants), *Appellants,*

versus

Boodhoo Singh (Plaintiff), *Respondent.*

Mr. R. V. Doyne and *Baboos Dwarkanath Mitter, Unnoda Pershad Banerjee,* and *Mohesh Chunder Chowdry* for Appellants.

Messrs. A. F. Lingham and *R. E. Twidale* for Respondent.

A suit based on a deed of sale to *H* is materially affected by his son *T* accepting a deed substituting another agreement and transaction in lieu of his father's deed of sale.

In the case of money under attachment with the Collector, and invested by him in Government 4 per cent. Promissory Notes, the difference between that and legal interest is only claimable from the date of release from attachment.

THE grounds taken in this special appeal are four : two upon the omission of the proper issues by the Lower Appellate Court in the order of remand, and two on the incorrectness of the principle which the Lower Appellate Court has applied to the making up the account to which its decision refers.

It will be necessary to premise that, in this case, one Baboo Boodhoo sues, as purchaser from the widow of Talib Ali Khan, the heir of Hossein Ali Khan.

Hossein Ali Khan, according to plaintiff's case, obtained a bill of sale of 4 annas of Mehal Ramnuggur from Rajah Purhlad Sein for a consideration of Rs. 75,000, *i. e.*, on the understanding that the purchaser was to advance funds for the prosecution of the Rajah's claims to the remaining 12 annas of the Mehal Ramnuggur.

The following extract from the judgment of this Court in Special Appeal, 27th September 1860, page 172, of the Privy Council Transcript, will show other facts in the case :—

"The execution of the bill of sale was admitted by the Rajah, but he held himself justified in disputing it on the ground that the consideration alleged (Rs. 75,000) had not been paid. Payment of the consideration was also pleaded by the plaintiff, and a duly signed receipt for the full amount put in by him, the execution of which was also admitted by the Rajah; but the Courts below held that the full amount had not been paid as averred at the time of the transaction ; that only a portion of some Rs. 20,000 was advanced by driblets to the Rajah at different times, and consequently that the case of the plaintiff was not made out as pleaded, and the Judge for this reason dismissed the plaintiff's claim. But, at the same time, to show his sense of the Rajah's misconduct in signing deeds in a reckless manner, adjudged him liable to pay all plaintiff's costs in the present action.

"The plaintiff's ground of special appeal, as laid before us by the learned Advocate-General, is that the Rajah, having executed and delivered to the plaintiff the bill of sale, had thereby *completed* the sale, and conveyed to plaintiff whatever title he himself possessed in the property to the extent of the 4 annas mentioned ; and that plaintiff is entitled to have possession of this share of the estate, whether consideration had been paid or not ; that, after execution of the bill of sale, or conveyance of the property, the title became vested in the plaintiff, and the estate belonged to him, while the consideration-money belongs to the vendor, and he can take what steps he pleases to enforce the payment of it ; but its non-payment in full cannot nullify the sale, or prevent the plaintiff having possession of the estate purchased by him."

The decision passed by the Court was: "It appears to us that, while in the one transaction the *re-payment* of money is entirely dependent upon the previous receipt of the consideration, there being no debt constituted, and consequently no amount legally recoverable, unless the money has been paid : on the other, the execution and *delivery* of the bill of sale perfects and completes the transactions ; that, while on the one hand the vendor has full power to determine when he shall execute and deliver the deed of sale, and having postponed so doing until the purchase-money is paid, yet, on the other, having such power of determination and discretion, and choosing to execute and deliver the bill of sale to the purchaser without receiving payment of the purchase-money, such deed and

"such act must be regarded as a valid con-"veyance of his right and title to the pur-"chaser, and debars him from holding the "land any longer as the owner of it; the "ownership then becomes vested in the pur-"chaser, and his title is in this country the "bill of sale so delivered to him.

"The Judge having held that the bill of sale "was executed and delivered to the plaintiff, "should have held the sale perfected and bind "ing upon the seller. Under the precedents "cited by us, and with reference to the plea "that full consideration had not been paid, "as a large amount (some Rs. 20,000) "was considered by the Judge to have been "advanced in part payment, while the seller "had kept possession for a series of years, "he should have called upon him to account "for the profits received by him during the "time of his incumbency; and, if the full "amount with reasonable interest was not "discharged from that source, he should "only hold the defendant entitled to con-"tinue in possession upon the ground, that "he had a right to look upon the estate sold "as burthened with such a lien from the "circumstance attending the sale of the "property, and not otherwise. With these "instructions, which the Judge can himself "carry out without remanding the case un-"der the new Code of Procedure, we remit "the case to be decided DE NOVO *in his Court "on the points now mooted, or upon others "which fairly arise in the pleadings.*"

Now, the first point in special appeal is, that the following issue of a prominent and important nature arose on the pleadings, and was the fifth issue fixed by the first Court, and that the decision of it fully came within the provision of the above order of remand, which, in fact, provided in terms by its concluding words for the trial of such issue, *viz.*, whether plaintiff's right under the *deed of sale* of Hossein Ali, dated 23rd September 1844, was not materially affected by the fact that Talib Ali, son of Hossein Ali, accepted a *mortgage* bond of the whole property for the same consideration, as was the basis of the deed of sale above referred to in respect to 4 annas of it?

Another prominent and important issue which arose on the pleadings was alleged to be, whether Rs. 20,000, or what sum, was paid at the execution of the deed, or when and in what proportions? It was further pleaded that if the fact were, that the Rs. 20,000 were not paid, then no credit for Rs. 20,000 should have been given by the Judge as had been done.

In the matter of the principle of calculation of the account, the first point urged upon is, that none of the money reached the special appellant till 1848; whereas yearly credits are taken from 1845 of money which, in fact, remained with the Collector, and in no way came to the appellant till the estate was released from attachment. The same plea is urged as to the credits of 1854 to 1858, *i. e.*, while the property was *again* under attachment.

The distinct point taken in respect to the principle of account is this, *viz.*, that the account has been based on a deducted payment of Rs. 20,000, as if made at the time of the execution of the deed of sale, whereas it is clearly shown and found that this was not so, but that the Rs. 20,000, if paid at all, were paid *from time to time only*, and that subsequent to the execution of the deed of sale; and that the deductions should, therefore, be credits only from dates of actual payments.

We think all these objections are valid.

On the first plea, it is contended on the other side that there was no order in the remand for the trial of the issue referred to. But it is obvious that the suit, which is based on the *deed of sale* to Hossein Ali, must be materially affected, if it is found to be a fact, as pleaded by special appellant, that the son of Hossein Ali, *viz.*, Talib Ali, accepted a *mortgage* deed *substituting another agreement* and *transaction* in lieu of his father's deed of sale; and we unhesitatingly pronounce that the words used in the order of remand "*de novo*," or such *other points as may fairly arise in the pleadings*," certainly include the order for a clear and distinct finding on evidence as to the issue raised by the above plea.

In deciding the issue, the Lower Court must consider whether any proprietary rights were ever delivered as a matter of fact to Hossein Ali under the original bill of sale. If not, and the deed remained in force, the question will be, whether Talib Ali consented to the cancelment of that deed, and the substitution for it of the second deed. If, however, proprietary right actually passed under the bill of sale, and were in any sense exercised by Hossein Ali, or his representative or agents, then the Lower Court must see whether the subsequent transaction by

Talib Ali amounted to re-conveyance of the property to the vendor followed by the mortgages to Talib Ali.

On the second point, we are of opinion that there is no sufficient finding on legal evidence that the Rs. 20,000 was paid as alleged. The Judge uses the words: "The consideration-money was Rs. 75,000, of "which Rs. 20,000 are admitted to have "been received from time to time." But who made the admissions, and when, and how such admissions were recorded, should all be shown, if such an admission was made to *the Judge;* and, if not, the point should be decided upon full legal evidence, including, of course, any specific admission which there may be on the point.

The first objection taken in regard to the account is not in any way shown by the other side to be incorrect. It is admitted by special appellant that 4 per cent. accumulated in the hands of the Collector by his investment in Government Promissory Notes; and, of course, so much of interest must be taken as a credit to special appellant; but the difference between that and legal interest can only be calculated from the date or dates on which the money actually reached special appellant's hands.

On the second matter of the principle of account, of course, the credit must follow the finding of fact as to the date or dates on which the Rs. 20,000, or portion of it, were paid.

In this view we decree the special appeal, and remand the case to be re-tried with reference to the above remarks.

The 22nd August 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Mortgage—Notice of foreclosure (to purchasers of Mortgagor's equity of redemption).

Case No. 1286 of 1865.

Special Appeal from a decision passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 16th February 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 18th March 1864.

Kishen Bullubh Muhta (Plaintiff), *Appellant,*

versus

Messrs. Belasoo Commur and others (Defendants), *Respondents.*

Mr. A. F. Lingham for Appellant.

Mr. J. Baptist for Respondents.

In what cases notice of foreclosure should be given to private purchasers of a mortgagor's equity of redemption.

Phear, J.—THIS is a foreclosure suit. In other words, it is a suit to obtain a declaration of right to certain mortgaged lands, on the ground that the year of grace has expired since the giving of due notice, according to Regulation XVII. of 1806.

Both the Lower Courts have found that, after the making of the mortgage, the mortgagor had sold his equity of redemption; and that the plaintiff had not given notice of foreclosure to the vendee. On this account they concluded that the notice required by Section 8 of Regulation XVII. of 1806 had not been given, and accordingly they both dismissed the plaintiff's claim.

On special appeal, the plaintiff urges that these decisions are wrong, because "a purchaser from a mortgagor or his representative is not entitled to be served with notice of foreclosure." This seems to me in its unqualified form a somewhat bold contention. The words of the Section are as follow: "Whenever the receiver or holder of "a deed of mortgage, &c., may be desirous "of foreclosing the mortgage, and rendering "the sale conclusive on the expiration of "the stipulated period, &c., he shall (after "demanding payment from the borrower or "his representative) apply for that purpose "by a written petition, &c., to the Judge of "the Zillah or City in which the mortgaged "lands or other property may be situated. "The Judge, on receiving such written "application, shall cause the mortgagor or "his legal representative to be furnished "with a copy of it, and shall, at the same "time, notify to him by a perwannah, under "his seal and official signature, that, if he "shall not redeem the property mortgaged

"in the manner provided for by the foregoing Section within one year from the date of the notification, the mortgage will be finally foreclosed, the conditional sale will become conclusive."

From this I unrderstand that the commencement of the final year of grace dates with the alternative of a notice either to the mortgagor or to his legal representative; and that, if neither alternative has happened, the year of grace cannot have begun to run. And, although the Judge is the instrument to give the notice, the mortgagee, who desires to make it the basis of a forfeiture to the mortgagor of the equity of redemption, must take care to put the Court in motion for the purpose, and cannot claim his strict legal rights while the notice, from whatever cause, (excepting only the fault of his adversary) remains unissued.

I may remark that I employ the term "issuing of notice" as synonymous with the word "notification," which is used in the Regulation, because a decision of the late Sudder Court, reported in No. 7, Select Reports, page 264, judicially declares that it is so; at the same time I desire to say that, in my judgment, this is not only an immaterial and forced construction of the word "notification" as used in the Regulation, but is also directly contrary to all principles of equity and good conscience, by which I conceive the Court ought to be guided when called upon to give effect to an enactment which the Legislature has made for the express purpose of creating for, and securing to, a mortgagor equitable rights beyond, and even in contradiction to, the strict letter of his contract. The result of this most unnecessary constructionin any particular case may well be that, notwithstanding the Regulation, and without laches of his own, the unfortunate mortgagor gets none of the equity of redemption which was intended for him.

Next, then, comes the question, what is the meaning of the term "mortgagor's legal representative"? I conceive the words naturally designate that person who, either by law or by contract between the parties, succeeds the mortgagor, whether mediately or immediately, in the position which he holds relative to the mortgagee in respect of the property which is the subject of mortgage; and with this view I believe all the published decisions of this Court accord, as well as those of the late Sudder Court. Now, a succession of this kind may occur either by reason of the death of the mortgagor, or by assignment of the equity of redemption as a consequence of insolvency, execution of a decree of Court, or voluntary contract: only it should be observed that, in the latter cases, the assignment must not be inconsistent with the terms of the original mortgage, and must generally be assented to by the mortgagee, or, in other words, must be such as the mortgagee is bound to recognize. When the mortgagee desires to foreclose, there can never be the least practical difficulty in ascertaining whether the equity of redemption, as against the mortgagee, is in the hands of the original mortgagor himself, or in those of one of the substitutes for him just described; and in whatever of these it is found to be, to that one, in my judgment, the notice must be issued in order to initiate the year of grace, whether it was by public or private sale, or otherwise that the assignee in question obtained his right to the assignment. But when once the time of grace is set running no subsequent assignment of his equity of redemption will stop it. If, therefore, in the case before us, the equity of redemption was duly and completely assigned in such a way as to bind the mortgagee *before* the notice of foreclosure, then the notice is not sufficient, which has not been issued to the assignee; but, if the assignment took place *after* the notice to the mortgagor, then no notice to the assignee is necessary, and the mortgagee ought to have the benefit of his proceedings. It cannot be gathered from the Lower Appellate Court when the notice of foreclosure was served relative to the assignment, or, indeed, whether any notice at all was served. I would, therefore, send back the case for re-determination in view of the above remarks.

Bayley, J.—The Lower Appellate Court having held in this case that notice to the purchaser by private sale of the right to equity of redemption of a mortgagor is requisite, the special appeal is now brought here on the one ground, that there is no authority in law for the Lower Appellate Court thus holding.

The passage and cases cited in pages 212 and 213 of Mr. Macpherson's Work (3rd edition) on Mortgages seem to leave the matter one of some doubt and conflict. But, on the whole, I think that the greater preponderance of authority is to be given to the view that, unless the mortgagor gave notice of a *private sale* of his equity of redemption, or unless otherwise cognizance on the part of the mortgagee of the transfer by such sale

is fully shown, the mortgagee is not bound to give notice to private purchasers of a mortgagor's equity of redemption. This view is to some extent supported by the decision of Justices Kemp and Shumbhoonath Pundit in this case (page 292, Marshall's Reports, Vol. I.).

But, at the same time, I conceive that, if the notice shall have been served on the mortgagor *before* his assignment, the notice has been sufficiently served, and no further notice to the assignee is necessary. As the Lower Appellate Court has not clearly found this latter matter, the case may be remanded to be re-tried with reference to these remarks.

The 22nd August 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Principal and Agent—Constructive Purchase—Nature of proof requisite.

Special Appeals from a decision passed by the Judge of Bhaugulpore, dated the 27th February 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 27th April 1864.

Case No. 973 of 1865.

Must. Roohonissa and others (Defendants), *Appellants,*

versus

Syud Woolfut Ali (Plaintiff) *Respondent.*

Moonshee Ameer Ali Khan Bahadoor, Mr. J. Baptist, and *Baboo Onoocool Chunder Mookerjee,* for Appellants.

Mr. C. Gregory for Respondent.

Case No. 1160 of 1865.

Meer Sufdur Ali (one of the Defendants), *Appellant,*

versus

Syud Woolfut Ali (Plaintiff), *Respondent.*

Mr. J. Baptist and *Baboo Onoocool Chunder Mookerjee* for Appellant.

Mr. C. Gregory for Respondent.

Suit by a principal against his agent to recover properties purchased by the latter out of the former's funds. HELD that the fact of the defendant being the plaintiff's agent, and having no means to purchase out of his own funds, was not *per se* sufficient to establish even a *primâ facie* case of constructive purchase. To make out a case of constructive purchase, the plaintiff must prove not only that the defendant was his agent, but that, at the time he made the purchase, he had in his hands funds of the plaintiff sufficient to make the purchase.

THIS is a case of a principal suing his agent on the allegation that he, having the charge and the management of his funds, fraudulently bought certain properties out of these funds in the names of his wives. The suit is to recover these properties out of his hands.

Both the Courts have found that the defendant was in the service of the plaintiff, acting as his general agent at the time the purchases were made. They also find that the purchases were made out of the plaintiff's funds, and that the defendant held the purchased property in trust for the plaintiff, the wives' names being merely used fictitiously.

Both the agent and his wife's appeal against the decision.

It is not clear in what way the Judge has arrived at the conclusion that the purchases were made out of the plaintiff's funds, and that the defendant held the purchased properties in trust for the plaintiff. But as far as we have been able to acquaint ourselves with the facts of the case, and the nature of the evidence which has been adduced to support it, we think that when the Judge says the funds were the funds of the plaintiff, he means that they must be considered to be so constructively, for there does not seem to be any evidence that the plaintiff supplied the defendant with any special funds on the occasion, nor any evidence sufficient to identify the money used for the purchase as the money of the plaintiff.

It being then a case of constructive purchase and a constructive trust, it is not sufficient for the Judge to say that he finds

from the evidence that the purchase was made out of the plaintiff's funds, and that the defendant was his trustee in regard to the property so purchased. The facts which the Judge considers established do not suffice to prove a constructive purchase and a constructive trust. The defendant may have been the plaintiff's agent at the time he made the purchases, and he may have had no means to make the purchases out of his own funds, but these two facts are quite inadequate by themselves to establish even a *primâ facie* case of constructive purchase. The Judge needs not to be told that an agent may acquire property for himself, and there is no presumption that the property he acquires during his agency is the property of his master. Therefore, to take that as evidence against the defendant, and to hold that the property is the plaintiff's, because the defendant had no means of his own to make the purchase, is not a legal mode of adjudicating the question at issue.

To make out a case of constructive purchase at all, the plaintiff would have to prove not only that the defendant was his agent, but that at the time he made the purchases he had in his hands funds of the plaintiff sufficient to make the purchase. Without this proof the plaintiff does not even start his case, for if it is not shown that the defendant had funds of the plaintiff adequate to make the purchase, what ground is there for holding that the property belongs to the plaintiff? This proof is, therefore, absolutely essential; and unless the Judge can find this proof in the evidence which has been adduced, the plaintiff must be considered to have failed in his suit. It is not for us, sitting in special appeal, to say whether the evidence does establish this; and we must, therefore, remand the case that the Judge may examine the evidence, and if he finds that it does establish that the defendant had funds of the plaintiff sufficient to make the purchase, that fact, coupled with the other facts found, would, we think, suffice to throw the burden of proving a purchase out of his own funds upon the defendant. This order of remand disposes of both the appeals.

The 9th May 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Gomastah—Power of, to grant pottahs.

Case No. 67 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 29th September 1864, reversing a decision passed by the Deputy Collector of that District, dated the 11th July 1864.

Kalee Coomar Doss (Plaintiff), *Appellant,*

versus

Sheikh Anees (Defendant), *Respondent.*

Baboos Chunder Madhub Ghose and *Sreenath Banerjee* for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

It does not lie within the ordinary scope of a gomastah's authority to grant pottahs. Special authority to grant them is necessary.

In this case the special appellant, as the dur-ijaradar for three years commencing from 1270 B. E., sued the defendant at the end of the year 1270 for a kubooleut at a specified amount of rent for the three years of the dur-ijara.

The defendant pleaded a pottah for the three years from the gomastah of the plaintiff. The genuineness of this pottah and the authority of the alleged grantor were denied by the plaintiff and by the said gomastah in his deposition on oath, and the rate of rents mentioned in the said pottah were stated by the plaintiff to be below the prevailing rates in the neighbourhood.

Apparently, there was some dispute also regarding the quantity of lands held by the defendant.

The defendant, in support of his allegations, produced another pottah from the dur-ijaradar who held before the plaintiff, and the plaintiff produced a pottah given by him to another ryot. The first Court found on evidence that the pottah set up by the defendant was not in the hand-writing of the gomastah of the plaintiff; that the latter had no authority; that there was no proof of the defendant having paid rents to the former dur-ijaradar under the pottah which the defendant produced as the pottah of the former dur-ijaradar; that the pottah given by the plaintiff direct to another ryot was proved; and that the rates of rent provided for in the pottah now set up by the defendant were below the rate actually paid before by the defendant. The Court then proceeded to try the case on the merits, and to pass a decree for a kubooleut at the rates, and for the lands that it considered were proved by a local investigation and other evidence in the case. The Lower Appellate Court, having examined the writing of the pottah in this case and in 20 other similar suits brought by the plaintiff against 20 other ryots, who also plead similar pottahs from the plaintiff's aforesaid gomastah, and having compared these writings with the pottah which the first Court had caused the gomastah to write in its presence, came to a conclusion that the pottah in dispute was written by the said gomastah. It then proceeded to try the question of the authority of the gomastah to grant the pottah, and held that the plaintiff must prove that no such power was given to the gomastah; that he has not produced the kubooleut he is likely to have taken from his gomastah; that he does not prove that only limited powers were given to the gomastah; and the Court decided that, the plaintiff having failed to prove all this, it was to be presumed that the gomastah had the authority to grant the pottahs.

The Court thought it unnecessary to try the other question which had been tried by the first Court connected with the fact of the execution of the pottah, and of the authority to execute it. Having dismissed the case upon this ground, the Lower Appellate Court had no occasion to try the propriety of the rates at which the plaintiff sued for a kubooleut. The decision in this case will affect the trial of the other 20 special appeals preferred by the plaintiff in the cases mentioned below. We think the investigation by the Lower Appellate Court, especially as regards the question of the authority of the gomastah, is substantially defective. The prece-

dent quoted by the Judge (page 3 of Hay's Decisions, 12th July 1863) has been since over-ruled. The true principle applicable to the case is to be found in the cases noted in the margin.*

* 2nd February 1865, page 55, Volume II., and 31st of August 1864, page 56, Volume I. of the Weekly Reporter.

The Lower Appellate Court should distinctly ascertain whether any written power was given to the gomastah by the plaintiff, and what were the powers and duties entrusted to him; whether any pottah, and, if so, by whom, has been given to other ryots of the property, besides the ryots who are defendants in this and the other 20 suits; whether any pottahs given by this gomastah have been recognised and confirmed in any and what manner by the plaintiff; what rents the ryots, who are now sued, paid before to the former dur-ijaradar; and whether the rates of rents mentioned in the pottahs now set up by them are below those paid before them. Having found these facts, the Court must draw such conclusions as it thinks will be fairly deducible from the findings and evidence with regard to the fact of the genuineness of the pottah and of the authority of the gomastah to grant it.

The case is accordingly remanded to the Lower Appellate Court. The order in this case will also apply to these 20 cases from Nos. 68 to 87 of 1865, both inclusive, which are also to be remanded with the same directions.

The 10th May 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Limitation under Act X. of 1859 (not affected by proceedings of Civil Court fixing rate of rent) —Suit for back rents.

Case No. 3191 of 1864 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 12th July 1862, modifying a decision passed by the Deputy Collector of that District, dated the 23rd April 1864.

Nawab Nazir Sidij Nazir Ali Khan Bahadoor (Defendant), *Appellant,*

versus

Jugut Tara Chowdhrain (Plaintiff), *Respondent.*

Baboo Ashootosh Dhur for Appellant.

Baboo Hemchunder Banerjee for Respondent.

The fixing of the rate of rent in an execution-proceeding of the Civil Court will not save the limitation under Act X. of 1859.

Where a suit is pending to determine the rate of rent, back rent can be sued for only within one year of the determination of the rate.

THIS is a suit for rent under Act X. Plaintiff claims rent from 1852. The appellant, defendant in the case, is willing to pay the rent for the three years previous to suit, but objects to the old part of the claim. We think that plaintiff cannot, in this suit, obtain more than defendant is willing to pay. Plaintiff will have his rent for the Bengalee years 1267, 1268, and 1269.

Plaintiff contends that the rent was fixed and became due in an execution-proceeding of the Civil Court in 1862, and that he may bring his suit for the whole within three years of that date. But, besides a doubt as to the jurisdiction of the Principal Sudder Ameen who so fixed it, and the retrospective effect of the order, we do not think that the effect would be to save the limitation under Act X. Plaintiff quotes cases to show that, if a suit were pending to determine the rent, the back rent may be sued for any time within one year of the determination of the rate; but, if that be so, it still will not cover plaintiff's case, as he did not sue within one year. Plaintiff's only remedy for the past period seems to have been by executing the civil decree for wasilat. Plaintiff will have costs of all Courts in proportion on the whole amount now declared to be due. Any sum paid into Court will be taken in part satisfaction of the decree.

The 10th May 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Rights of Occupancy—Transfer of Tenure.

Case No. 120 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 29th December 1864, modifying a decision passed by the Deputy Collector of that District, dated the 28th June 1864.

Sreeram Bose and others (Defendants), *Appellants*,

versus

Bissonath Ghose and others (Plaintiffs), *Respondents*.

Baboo Nilmadhub Sein for Appellants.

None for Respondents.

The determination of the fact whether or not a tenure with rights of occupancy is transferable by sale depends upon local custom.

THE Court below has disallowed the sale of the rights of occupancy enjoyed by a tenant. It cannot be denied that such tenures are occasionally saleable, and the determination of the fact, whether any particular tenure is saleable or not, depends upon the local custom.

The case is remanded to the Lower Appellate Court to find out what is the local custom on this point, and to decide in accordance with it the question whether the tenure may be transferred by sale.

The 10th May 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges*.

Principal and Agent—Title.

Case No. 110 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 22nd September 1864, reversing a decision passed by the Deputy Collector of that District, dated the 29th July 1864.

Dhunun Joy Kur (Defendant), *Appellant*,

versus

Gobind Churn Doss Mohunt (Plaintiff), *Respondent*.

Baboo Tarucknath Sein for Appellant.

Baboo Woopendur Chunder Bose for Respondent.

An agent employed in collecting rent cannot question the title of his principal to receive the rent, but must pay him all that he collects.

THE special appellant, as the agent of his principal, must pay all that he has collected for his master, and cannot be allowed to plead any question regarding the title of his principal to realize the rents in dispute. The special appeal is rejected with costs.

The 10th May 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges*.

Suit for Kubooleut—Plea of separate title—Non-receipt of rent.

Case No. 3350 of 1864 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Patna, dated the 8th July 1864, affirming a decision passed by the Assistant Collector of that District, dated the 28th April 1864.

Syed Jeshan Hossein (Plaintiff), *Appellant*,

versus

Bakur and others (Defendants), *Respondents*.

Mr. R. E. Twidale for Appellant.

Mr. C. Gregory for Respondents.

A suit for a kubooleut is not the correct mode of establishing a title. Where a separate title is pleaded, and there is no proof of receipt of rent from the party from whom the kubooleut is required, the question of title must be decided before the suit for a kubooleut can proceed.

PLAINTIFF sued one Bakur for a kubooleut under Clause 1, Section 23, Act X. of 1859.

The defendant Bakur answered that he was the servant of one Mahomed Ibrahim, and had occupied the land under him, and had never paid rent to the plaintiff.

Mahomed Ibrahim appeared also, claiming the land as his lakheraj.

The Deputy Collector, considering it proved from the evidence that defendant had never paid rent to plaintiff, but had occupied the land as the servant of Mahomed Ibrahim, dismissed the plaintiff's claim.

The Judge, on appeal, though his judgment is not so clear as it might be, and contains matter which had better have been omitted, substantially came to the same result.

Plaintiff now appeals specially, urging that the case has miscarried, and the Judge should have tried his right to receive a kubooleut from Mahomed Ibrahim. But we think this is not so. A suit for a kubooleut is not the correct mode of establishing a title, and when a separate title is pleaded, and when, as in the present instance, no receipt of rent from the party, from whom the kubooleut is required, is proved, the question of title must be decided before the suit for a kubooleut can proceed.

Under this view, we reject the special appeal with costs.

The 11th May 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Suit for declaration to set aside right to quit-rent tenure—No Notice—Order for assessment.

Case No. 3505 of 1864.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 3rd September 1864, reversing a decision passed by the Extra Assistant Commissioner of Maunbhoom, dated the 10th August 1863.

Ghunshyam Chobey (Defendant), *Appellant,*

versus

Kasheenath Shanteekaree and others (Plaintiffs), *Respondents.*

Baboos Nilmadhub Bose and *Ashootosh Dhur* for Appellant.

Baboos Juggadanund Mookerjee and *Banee Madhub Banerjee* for Respondents.

In a suit for a declaration of title to set aside an alleged right to a quit-rent tenure, no notice under Section 13, Act X. of 1859, is required.

In such a suit it is premature to go beyond a decree for a declaration of title, and to order assessment at village rates.

THE main plea is that the petitioner is entitled to hold at his past uniformly paid quit-rent. But we remark that the documents on which the defendant bases his title are found, as a fact, to be forgeries.

It is also pleaded that no notice was issued under Section 13, Act X. of 1859. But this is not distinctly stated in the petition of special appeal; and, even if it were, it is utterly untenable. The suit is one for a declaration of title to set aside an alleged right to a quit-rent tenure; and no notice under Section 13 is requisite in such a suit.

It is further urged, though not in the petition of special appeal, that the declaration of title and order to assess at village rates should have been withheld, when the suit was only to set aside the defendant's deeds. We think this plea so far admissible that it is premature in this suit to go beyond a decree for a declaration of title, and now to order assessment at village rates. For ing the appeal in the main groundless, we dismiss it with costs.

The 11th May 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Appeal (to Collector from decision of Deputy Collector under Clause 4, Section 23, Act X. of 1859).

Cases Nos. 3364 to 3378 of 1864 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Rajshahye, dated the 26th August 1864, affirming a decision passed by the Collector of that District, dated the 28th June 1864.

Mr. G. R. Barry (Plaintiff), *Appellant,*

versus

Dwarkanath Biswas (Objector) and Gopeenath Sircar (Defendant), *Respondents.*

Mr. R. T. Allan and *Baboo Poornochunder Mookerjee* for Appellant.

None for Respondents.

An appeal lies under Section 155, Act X. of 1859, to a Collector from the decision of a Deputy Collector, under Clause 4, Section 23.

THESE 15 cases are all analogous, and it is now admitted that there is no ground for special appeal. The suits were for rent under Section 23, Act X. of 1859, and the amounts were in every case under rupees 100. The Deputy Collector decided, after an objection under Section 77, in favor of appellant, the plaintiff. The Collector reversed the decision on the ground that respondent, the intervenor, was in actual receipt of rent prior to the suit. The Judge properly declined to hear appeals. All these appeals are dismissed.

Afterwards, the pleader for the appellant urges that there is no appeal at all from a decision under Section 77. But, as the suit is one under Section 23, Clause 4, to which the intervenor is made a party, and there is nothing to bar appeal under the general provisions regarding such suits, we think that the appeal must lie under Section 155.

The 12th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Jurisdiction—Suit by lakherajdar for ejectment—(Clause 6, Section 23, Act X. of 1859).

Case No. 3705 of 1864 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 23rd September 1864, affirming a decision passed by the Deputy Collector of that District, dated the 30th June 1864.

Gooroo Pershad Roy and others (Defendants), *Appellants,*

versus

Nimaye Chand Pulshain (Plaintiff), *Respondent.*

Baboo Baneenath Bose for Appellants.

Baboo Greesh Chunder Ghose for Respondent.

A Collector has no jurisdiction in a suit for ejectment under Clause 6, Section 23, Act X. of 1859, brought by a lakherajdar.

THIS was a suit by a lakherajdar to recover possession of his lakheraj land from the zemindar in whose estate it was situated, and who, he alleged, had forcibly ousted him.

The Courts have found the ouster proved, and decreed the plaintiff possession.

It is on special appeal objected that this suit has been brought under Section 6, Clause 23, of Act X. of 1859, which does not apply to such suits. The respondent's vakeel admits that this is the case. That law applies to tenants, and not lakherajdars, and the Collector had no authority under it to entertain the suit.

The decisions passed are reversed, and plaintiff's suit dismissed as untenable in the Revenue Courts. Each party will pay his own costs of this litigation.

The 12th May 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Limitation—Jurisdiction—Error of Court (in striking off suit for rent with proviso for revival pending decision of suit for kubooleut, instead of postponing it).

Case No. 358 of 1864 under Act X. of 1859.

Regular Appeal from a decision passed by the Deputy Collector of Chittagong, dated the 26th June 1864.

Mahomed Kalee Shikdar (Defendant), *Appellant,*

versus

Sheikh Ali Hossein Chowdhry (Plaintiff), *Respondent.*

Mr. A. F. Lingham for Appellant.

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Respondent.

Suit laid at rupees 15,535-4 annas.

A suit for rent was brought whilst a suit for a kubooleut was pending between the parties. The Lower Court, instead of postponing the former pending the decision in the latter suit, struck off the suit with a proviso for the revival of the suit when the other case was finally decided. HELD that the error of the Court was more of form than of substance; that the case should be treated as if it had been simply in abeyance; that the suit was quite legal; and that no part of the claim was barred by limitation.

THIS is an appeal from a decision casting the defendant in rent to the amount of rupees 7,650-15, with an additional sum for damages, &c., of rupees 1,427-5-6.

The Deputy Collector, in a very full, well-written, and well-reasoned judgment, has arrived at the conclusion that a certain pottah and some receipts filed by the defendant are false; that no abatement of his rate was granted by the plaintiff; and that no payment was made to him.

In appeal, we are first asked to consider the suit illegal on a point of jurisdiction. It seems that the plaintiff instituted this suit on the 27th of December 1861, when a former Deputy Collector struck the same off on the 21st of February 1862, on the ground that it could not be decided until a suit about a kubooleut, involving the rate of rent payable, and pending between the same parties, had been decided by the High Court. The former Deputy Collector added a proviso

that the present suit might be revised when the other case had been finally decided. The suit was revived under the above proviso, against which no appeal was ever preferred by either party, on the 12th of May 1864; and it is now contended by the defendant that the latter date, and not that of December 1861, should be considered the date of institution. It would have been the more correct course, we think, for the former Deputy Collector to have retained the case on his file pending the ultimate decision of the High Court in the case of the kuboolent; but we are quite warranted in treating the case, for the ends of justice, as if such an order, and not a proviso for revival, had been passed. It would be very unfair to make the plaintiff suffer for what had been an error of the Court itself, and an error more of form than of substance. In this view, we shall treat the case as if it had been simply in abeyance, on the file of the Deputy Collector, between December 1861 and May 1864, and shall hold that the suit is quite legal, and that no part of the claim is barred by limitation.

Next, it is pleaded that no less than nine years' rent is sued for, and that such a claim is not tenable under the provisions of Act X., Act XIV. of 1859 not applying to the case. We fully admit that the provisions of Act X., which is a Code complete in itself, must govern this case, and that Act XIV. of 1859 cannot be applied. But, on turning to Section 31 of Act X., we find that the plaintiff can take 3 years or 12 years, whichever he pleases, under that part of the Section which says: "For arrears of rent due at the passing of this Act, a suit shall be brought within 3 years after the passing of this Act, or within the period now allowed for the institution of such suits in the Civil Court, whichever may first expire." This Section is quite clear and decisive on the point, and the defendant is not entitled to any abatement.

On a third point, as to interest, we find that the Lower Court has only given the same from 19th of August 1863, and we see no reason whatever to interfere with this part of the judgment, or with the order for damages. On the merits, the case, it is abundantly clear, is quite unassailable, owing to the full, able, and impartial way in which the case has been treated by the Lower Court.

We see no reason to entertain a claim raised at the hearing in cross-appeal by the plaintiff for more interest, as we are of opinion that he has already met with every consideration, and has gained all to which he is entitled. We have, therefore, only to uphold the judgment in its integrity, and to dismiss the defendant's appeal with all costs.

The 12th May 1865.

Present:

The Hon'ble J. B. Phear and F. A. Glover, *Judges.*

Limitation—Suit to obtain declaration of title by setting aside plea of partition in previous suit for rent.

Case No. 3647 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 19th September 1864, affirming a decision passed by the Sudder Ameen of that District, dated the 20th February 1864.

Kundurp Narain Singh and others (Plaintiffs), *Appellants,*

versus

Bundoo Ram Sein (Defendant), *Respondent.*

Baboo Kishen Succa Mookerjee for Appellants.

Baboo Banee Madhub Banerjee for Respondent.

Neither Section 77, Act X. of 1859, nor Section 5, Act XIV. of 1859, but the ordinary Law of Limitation (namely 12 years) applies to a suit to obtain a declaration of title by setting aside a plea of partition urged by the defendants in a former suit for rent under Act X. of 1859.

THIS was a suit by the plaintiff (special appellant before us) to have his right and title declared to certain lands. It appears that he originally sued under Act X. of 1859 for arrears of rent, when he was met on the part of the defendants by the plea that they held the land on which rent was claimed under a "partition." The defendants, we may remark, are admitted to be co-sharers with the plaintiff in the general estate, but are, with regard to this particular land, alleged to be in the position of simple tenants, and, as such, liable for rent.

Both Lower Courts held that, as the present suit was not brought within one year of the passing of the Collector's decision which was adverse to the special appellant, it was barred under Section 77 of Act X. of 1859.

It is urged in special appeal that this Section does not apply, and that the special appellant is not barred under it.

Ve think that this objection must be al-ed. This was not a suit brought to re-se a Collector's award, but one for a de-ation of title which depended on the dity of the special respondent's plea of artition of the estate under which they ame the owners of the land on which was claimed. Section 77 of Act X. 1859 would not therefore apply, nor do understand how the Lower Courts ap-d it; that Section refers to cases in ch a third party intervenes, and comes in rove that he was in the enjoyment of the of the disputed land. In this case there no intervention. The suit was decided the Appellate Revenue Courts on the und of the "partition;" and, that being so, ever other Section of the Act might e applied, Section 77 clearly could have nothing to do with it.

t is further contended that, granting that tion 77 of Act X. does not apply, the cial appellant will be equally barred by tion 5 of Act XIV. of 1859. But this tion, we observe, refers to suits for the ersal of a decision of another Court; ereas the present suit is not to reverse the lector's decision, but is an original suit obtain a declaration of title, by setting le the defendant's plea of partition.

We are of opinion, therefore, that the ordi-y Law of Limitation, *viz.*, 12 years from cause of action accruing, applies to this e; and that the suit must be remanded in er that the Court below may find on that nt. If the special appellant can prove possession any time within 12 years. will be entitled to sue to set aside the ged partition; and, if he succeeds in that, will, of course, be entitled to a decree claring his right to the land in question. Costs will follow the result.

The 13th May 1865.

Present:

e Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

view of order in execution of decree (by Deputy Collector)—No appeal to Collector—Settlements out of Court—Section 206 of Act VIII. of 1859 not applicable to decrees under Act X.

ase No. 313 of 1864 under Act X. of 1859.

Miscellaneous Appeal from an order passed by the Judge of Purneah, dated the 27th April 1864, affirming an order passed by the Deputy Collector of that District, dated the 15th February 1864.

Rajah Protab Chunder Singh, for self and as Executor to the estate of the deceased Issur Chunder Singh, *Appellant,*

versus

Kanaye Lal Doss, *Respondent.*

Mr. R. T. Allan and *Baboo Dwarkanath Mitter* for Appellant.

Baboos Debendro Narain Bose and *Romesh Chunder Mitter* for Respondent.

A Deputy Collector acts without jurisdiction in reviewing his order passed in execution of decree.

So also a Collector in receiving an appeal from an order passed in execution.

Section 206 of Act VIII. of 1859 (prohibiting settlements out of Court) is not applicable to decrees under Act X. of 1859.

THE petitioner states that he obtained a decree for rent, and took out execution. Defendant pleaded payment, which plea was rejected by the Deputy Collector, and execution was ordered to be taken out. The debtor appealed to the Collector, and he set aside the order. The decree-holder appealed to the Judge, who refused to interfere on the ground that he had no jurisdiction. The decree-holder comes to this Court, and prays its interference under the provisions of Section 35, Act XXIII. of 1861, on the ground that the Collector has acted without jurisdiction in receiving an appeal from the Deputy Collector passed in execution of a decree.

The respondent states that the Deputy Collector passed contradictory orders. He first rejected the application for execution, holding, for reasons assigned by him in his proceeding of 12th November 1863, that the amount of the decree had been paid; but on the receipt of a petition presented by the decree-holder to the Collector, and referred to him in the usual course of business, he reviewed his order, and passed a further order for execution on 15th February 1864, quoting the provisions of Section 206 of Act VIII. of 1859, as prohibiting settlements out of Court, and it is urged that the Deputy Collector had no power to review his order.

We think that the Deputy Collector in reviewing his order, and the Collector in receiving an appeal from an order passed in execution, both acted without jurisdiction. We must set aside all intermediate orders, and restore the first one passed by the Deputy Collector on 12th November 1863. The provisions of Section 206 of Act VIII. of 1859 are not shewn to be applicable to

decrees under Act X. of 1859. Appeal dismissed; but under the circumstances we think the parties should pay their own costs.

The 15th May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Jurisdiction—Suit for ejectment against Landlord and third person.

Case No. 3207 of 1864.

Special Appeal from a decision passed by Mr. W. T. Tucker, Judge of Backergunge, dated the 22nd July 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 31st January 1864.

Luckhee Prea Dabea and others (Defendants), *Appellants,*

versus

Juggodumba Dabea (Plaintiff), *Respondent.*

Baboos Onoocool Chunder Mookerjee, Sreenath Doss, Kally Mohun Doss, and *Mohinee Mohun Roy* for Appellants.

Baboos Hem Chunder Banerjee and *Bungseedhur Sein* for Respondent.

Clause 6, Section 23, Act X. of 1859, applies only to cases where the ejectment complained of is effected solely by the person to whom the plaintiff's rent is payable.

When the person entitled to receive rent acts jointly with a third person in ousting the tenant and keeping possession of the land, the tenant may treat this as a joint cause of action against both wrong-doers.

THIS was a suit to recover possession of land, to which the plaintiff claims to be entitled, and from which, he says, the defendants have dispossessed him under color of an Act IV. award.

The plaintiff claimed as howaladar under a pottah granted some long time ago by four joint undivided shareholders of the land, namely:

Rajcomul Roy and others, owners of thirteen gundahs.

Ramconye Roy and others, owners of another thirteen gundahs.

d.—Jagat Narain Roy and others, owners of another thirteen gundahs.

Shib Narain Roy and others, owners of the remaining 18½ gundahs.

After the granting of the pottah, Shib Narain's share became vested by assignment in

d. Sreemutty Chowdrain,
Hurro Chunder Bose,
Gocool Chunder Pall,
Tara Churn Ghose,

in four equal undivided shares.

And later still, Sreemutty Chowdrain leased her share jointly to

d. Jaga Mohun,
d. Luckee Prea,
d. Ramcomul,
d. Doorga Churn, as meeras ijaradars.

The defendants in the suit were those of the above-named persons to whom we have prefixed the letter (*d*), together with one *Bissessur Mitter*, who alleged himself to be howaladar of the thirteen gundahs share of the property belonging to Jagat Narain and his co-sharers therein.

Both the Lower Courts decreed in favor of the plaintiff.

The defendants specially appeal to this Court against the decision of the Judge below.

The *first* objection urged by them is, that this is a suit brought by a tenant against his landlord to recover possession of his land within the meaning of Clause 6 of Section 23 of Act X. of 1859, and therefore is not cognizable by the Civil Courts.

We think that the words of that Clause confine its application strictly to cases where the ejectment complained of is effected solely by the person to whom the plaintiff's rent is payable. When the person entitled to receive the rent acts jointly or in concert with a third person in ousting the tenant and keeping possession of the land, the tenant is entitled to treat this as a joint cause of action against both wrong-doers, for which he can get no remedy, if he cannot have recourse to the Civil Courts. It is true, perhaps, that he might elect to split his cause of action into two, bringing one suit in the Collector's Court against his landlord, and a second in the Civil Court against the stranger. But this would not necessarily give him full relief, and would very little accord with the policy of the law, which is to discourage multiplicity of actions for the same grievance. On full consideration we are of opinion that there is nothing in Section 23 of Act X. of 1859 to exclude such a joint cause of action as that above mentioned from the jurisdiction of the Civil Courts.

In the case before us the plaintiff sued Bissessur jointly with his landlord, charging one act only of dispossession and eviction. And both the Lower Courts have found as a fact (whether rightly or wrongly is now unimportant) that the plaintiff's charge is established. Now, Bissessur is in no sense entitled to receive rent from the plaintiff, nor has he ever either been so or claimed to be so; on the contrary, he claimed to stand in Bissessur's shoes, or, at any rate, by the side of him, and not above him. Nor, again, is he a mere *pro formâ* defendant; for of all the defendants he appears to be the one mostly personally interested in the alleged act of eviction, and most to be benefited by its success. The cause of action upon which the plaintiff sues is clearly, not solely, or even essentially, against the person entitled to receive his rent, and, therefore, the Civil Courts have jurisdiction to entertain it. We accordingly over-rule the appellant's first objection.

The defendants next object that the Lower Appellate Court based its judgment, both as regards the preliminary issue, and as to the merits, on evidence which was either legally inadmissible or insufficient. It appears that the plaintiff did not produce the original pottah which gave him his howala; and it was said that its absence was not sufficiently accounted for to justify the reception of secondary evidence of its contents; but this is a question solely within the discretion of the Court below, with the exercise of which we cannot interfere unless we see that it is illegally abused. We cannot say that any such abuse took place in this case: indeed, most of the evidence, the reception of which is complained of, is under the circumstances of the case of the nature of principal, and not of secondary evidence, because it purports to consist of written admissions, made either by the several defendants themselves, or by persons whose admissions, it is said, would bind them relative to the matter now in issue. It seems that all the defendants admit the plaintiff's title as howaladar to some lands; and the only issue between the parties is whether or not the lands which form the subject of this suit fall within the boundaries of his howalah. The first piece of evidence of admission adduced in the Court below, and considered by it, is the record of a suit to obtain re-payment of excess of rent brought by the present plaintiff's father against Sreemutty Chowdrain, one of the present defendants. The decree in that case was not, and could not have been, relied upon as effecting a *res judicata* relative to boundaries between the parties. But it was urged that, as the then plaintiff had in his plaint clearly set out the boundaries of his howala, and the then defendant had not disputed them, this silence must be taken as tacit acquiescence in their correctness, and, therefore, not available as evidence against her. This reasoning cannot be upheld. The boundaries of the howala were entirely irrelevant to the issue in that suit; and there was no occasion whatever that Sreemutty Chowdrain, in her answer, should notice them; and no reasonable presumption, either one way or the other, can be founded on the circumstance that she omitted to do so. Consequently there is nothing in this record which ought to be treated as evidence against Sreemutty Chowdrain, or any one claiming through her. Next, were two documents precisely similar the one to the other, the first signed by Rajcomul Roy, and the other by Ramconye Roy purporting to contain a recital of the fact that plaintiff possessed the howalah, and to set out the boundaries thereof preliminary to giving an authority to a tehseeldar to receive the subscriber's share of the rent. But it is to be observed that neither Ramcomul nor Ramconye are defendants to this suit, and none of the actual defendants claim through them, so that this evidence also must be rejected. Then came a formal statement as to the boundaries of the howala made by Sreemutty Chowdrain in 1856 in the proceedings of the Act IV. case; and, as far as it goes, this is very proper to be used against Sreemutty Chowdrain herself. But its effect must be confined to her alone, because the mouraseedars claim from her by a title originating long antecedent to the time of her making this admission, and cannot, therefore, be affected by it. An attempt was made to carry back the date of this admission to the year 1847, because a passage in it acknowledged the correctness of the boundaries as set out in a previous *istaklalee*, or deed of confirmation, and it was said that the *istaklalee* there alluded to was of the year 1847. Certainly an *istaklalee* of the year 1847 was filed with the other Act IV. proceedings; but it was in no way identified by Sreemutty Chowdrain herself, or proved by any other evidence; and, unless shown to be the act of Sreemutty Chowdrain in 1847, it could not be used for the desired purpose; the plaintiff's contention on this point, therefore, fails.

Lastly, in this very suit Jagatnarain has

come into Court, and admitted the plaintiff's case; and it is said that this admission binds Bissessur, who claims through him. This, however, cannot be supported. Whether or not any admission by Jagatnarain could have been available against Bissessur would be questionable; but this one certainly cannot, for it is made long after the date of the pottah from Jagatnarain, which forms the rest of Bissessur's title.

We are, therefore, of opinion that the defendant's second objection must be upheld to the extent of declaring that there is no legal evidence in the case against any of the defendants except Jagatnarain and Sreemutty Chowdrain. This being so, and Sreemutty Chowdrain not being a person entitled to receive rent from the plaintiff in respect of the land in question, this suit is, for the reason above mentioned, rightly entertained in the Court below; and we see no reason to interfere with the judgment as regards Jagatnarain and Sreemutty Chowdrain. As to the other defendants, the decision of the Court below must be reversed with costs.

The 16th May 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Order of Collector in execution of decree—No Appeal.

Case No. 331 of 1864.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 29th March 1864.

Chunder Coomar Roy (Decree-holder), *Appellant,*

versus

Mr. H. Mackenzie (Judgment-debtor), *Respondent.*

Baboo Sreenath Doss for Appellant.

None for Respondent.

Sections 103, Act X., and 209, Act VIII. of 1859, give no authority to a Judge to receive an appeal from an order passed by a Collector in execution of a decree under Act X.

THE Court has ruled by a Full Bench decision that there is no appeal from an order passed by a Collector in execution of a decree under Act X. of 1859 (Ruttun Monee Dossee, appellant, 16th March 1864). Section 103 of Act X. of 1859, and Section 209 of Act VIII. of 1859, under which the Judge professes to have acted, give him no authority to receive appeals, which the law does not warrant. We reverse the order of the Judge with costs.

The 17th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Deduction on account of diminished rents of ijara—Negligence of ijaradar to collect.

Case No. 3648 of 1864 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 1st September 1864, modifying a decision passed by the Deputy Collector of that District, dated the 19th March 1863.

Bissoroop Dutt (Plaintiff), *Appellant,*

versus

Binoderam Sein (Defendant), *Respondent.*

Baboo Luckhee Churn Bose for Appellant.

Baboo Banee Madhub Bose for Respondent.

A contract providing for a deduction being made in the rents of an ijara in the event of diminution affords no ground for a deduction owing solely to the ijaradar's negligence to collect the rents.

THE contract in this case was that the ijaradar should pay a certain rent annually; but that, if the rent-roll of the estate, as stated in the ijara-pottah, was diminished in consequence of the ryots running away or giving up their land, or of the lands being washed away, or in any other manner, a corresponding deduction should be made in the rents of the ijara.

The ijaradar here has claimed a deduction for a certain amount which he has not collected.

The first Court finds that it was not collected through the ijaradar's negligence, and refused to allow for that sum. But the Judge, reading the terms of the contract strictly, has laid down that, as the rents were unrealized, the ijaradar was entitled to a deduction, whatever may have been the cause.

The special appellant objects to this finding. We think the Judge was in error. An equitable construction must be put on the contract, and the whole clause regarding the allowance for a diminished rent must be read together. If the decrease in rents has been owing to matters over which the ijaradar had no control, he would be entitled to a deduction; but not if it is owing solely to his own negligence to collect the rents.

We reverse the Judge's decision, and restore that of the first Court's. Respondent will pay all the costs of the case.

The 17th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Intervention (under Section 77, Act X. of 1859)—Decree of Civil Court confirming title—Butwarah award—Estoppel.

Case No. 3617 of 1864 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 13th September 1864, reversing a decision passed by the Collector of Howrah, dated the 28th April 1864.

Sreenath Ghosal (Plaintiff), *Appellant,*

versus

Joy Narain Kaver and others (Defendants), *Respondents.*

Baboos Tarucknath Sein and *Dwarkanath Mookerjee* for Appellant.

Baboo Prosunno Coomar Sein for Respondents.

A Collector is bound to consider a decree-holder who has executed a decree of a Civil Court confirming him in his title to be in possession, and to refuse to hear any application from a third party under Section 77, Act X. of 1859. But a butwarah award is no absolute proof of title, and no estoppel in the way of an intervenor who can prove that he has received and enjoyed the rents claimed from a date subsequent to the butwarah.

THE point taken in special appeal in this case is that the Judge was wrong in dismissing plaintiff's claim under Section 77 of Act X. of 1859, as the right to receive rent had already been given to the plaintiff by the butwarah proceedings.

We see no reason to interfere. The wording of the Section is clear and distinct. It is not the right to receive rent that is to be enquired into by the Collector, but the *actual receipt* and *enjoyment* of such rent; and it is quite possible that the special appellant may have had the land, the rent of which is claimed by a third party, awarded to him by butwarah in 1857, without having ever received rent for the same, and from which indeed he may, for anything before the Court, have been dispossessed long since. Had special appellant been confirmed in his title by decree of the Civil Court, possession might have been considered to have followed title; and it would have been manifestly improper to refer a party claiming rent under the circumstances of this case, and who had already had his title declared by a decree of Court, to another civil suit. In such a case, the Collector would have been bound to consider a decree-holder who had executed a decree, in possession, and to have refused to hear any application from a third party under Section 77. But a butwarah award is no absolute proof of title, and no estoppel in the way of an intervenor who can prove that he has received and enjoyed the rents claimed from a date subsequent to the butwarah.

We dismiss the appeal with costs.

The 18th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Enhancement—Howaladars so called, but in reality occupant ryots.

Case No. 3709 of 1864 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 15h September 1864, reversing a decision passed by the Deputy Collector of that District, dated the 27th April 1864.

Asmutoollah and others (Defendants), *Appellants,*

versus

Kalee Pershad Doss Chowdhry (Plaintiff), *Respondent.*

Baboo Greeja Sunkur Mojoomdar for Appellants.

Baboo Bungsee Dhur Sein for Respondent.

A howaladar, who is so only in name, but is in reality a mere cultivating ryot, and tills with his own hands the land he holds, is not entitled to hold at a lower rate than his neighbours.

THIS was a suit by the plaintiff, the owner of the howalah Muneeruddeen, for an enhanced rent after notice, against the defendants (special appellants before us) who held a 4½ annas share of tenure.

The Deputy Collector, before whom the suit was originally tried, dismissed the claim; but the Judge on appeal held that the tenure was not protected from enhancement, and that, in accordance with the Ameen's report, the rates should be enhanced according to the plaint.

The special appeal now before us is on the question of rates only. It is not contended that the special appellant has a mokurruree title, or has any right to hold his land at a fixed rate of rent.

It is urged in the first place that the tenure is confessedly a howaladaree one, that is, one in a middle position between landlord and ryot; and that the Judge ought to have assessed the rates accordingly, and not have made special appellant pay the same rates as any ordinary ryot.

In support of this argument, we have been referred to the case of Jadub Chunder Holdar, appellant, reported at page 313, Wyman's Journal, in which it was held that, although a middleman was liable to enhancement under the same circumstances as obtained in the present suit, he was allowed one-third of the increase. This would, no doubt, be a precedent applicable to ordinary cases of middlemen; but, in the present instance, the special appellant is only a middleman by name. He holds part of a howalah, and calls himself a howaladar; but in reality he is a mere cultivating ryot, and tills the land that he holds with his own hands.

Jadub Chunder's case refers to middlemen who cultivate by means of under-ryots, and to whom an allowance was made in the sense of malikana for the trouble and expense of collection.

But, although we consider the special appellant to have nothing more than the *status* of an ordinary occupant ryot, still, had he preferred the objection he now puts forward to the Judge, there would have been some ground for enquiry; but he did nothing of the kind. He knew that his claim to protection had been disallowed; but he never thought fit to urge his objections to the Ameen's rates, or to plead that he was privileged to hold at lower rates than his neighbours.

A second objection is taken on the ground that the Judge enhanced special appellant's rent without specifying the ground of enhancement under Section 17 of Act X. of 1859. This is not so. The Judge has, no doubt, worded his order vaguely; but his meaning evidently was that the rent was increased to that paid by the other ryots. The plaint, we observe, sets forth that as well as other grounds of enhancement, and the Judge relied on the evidence adduced that the rent paid by the special appellant was not a fair one in comparison with that paid by his neighbours.

There remains a last objection, that the lands in suit had been already disposed of by the special appellant to a third party who intervened in the suit, but of whose objections the Judge took no notice. This objection is, we think, altogether untenable. The so-called sale to the intervenor was never registered, and the zemindar was not in consequence bound to acknowledge it. He sued the tenant whose name was in his books, and the Judge was right in refusing to entertain the third party's objection.

In no point of view, therefore, do we think that the special appellant has made out a case, and we dismiss his appeal with costs.

The 18th May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Jurisdiction—Suit for rent (where to be instituted)—Meaning of the words "Revenue office" in Section 162 of Act X. of 1859.

Case No. 3529 of 1864.

Special Appeal from a decision passed by the Officiating Additional Judge of Dacca, dated the 6th September 1864, reversing a decision passed by the Principal Sudder Ameen of Furreedpore, dated the 27th March 1863.

Kazee Abdool Huq and others (Plaintiffs), *Appellants,*

versus

Azeemoonissa and others (Defendants), *Respondents.*

Baboos Banee Madhub Banerjee and *Chunder Madhub Ghose* for Appellants.

Baboo Gopal Lal Mitter for Respondents.

The words "Revenue Office of the District or Sub-division" used in Section 162 of Act X. of 1859 as the place where a suit for rent is to be instituted, mean, not the Office where the revenue is paid, but the Office of the Revenue Officer of the District or Sub-division where the greater part of the lands in respect of which the rent is claimed is situate.

In this case, plaintiff sued for confirmation of title in a certain joint jote jumma, admitted by all parties to be entirely topographically situated in zillah Furreedpore, and to reverse a decree for rent due under which the tenure was sold in execution.

Defendant, Mr. Bell, of Mudundaree, alleges that he is putneedar of the mehal in which plaintiff's jote lies; but that, as the putnee is one which pays its revenue in the Jessore Collectorate, he properly sued, in that Collectorate, those parties who were then registered in his serishtah as holding this jote, claiming arrears of rent of 1265, and got a decree on the 23rd May 1859 under which the sale of the jote took place.

The first Court held that the above suit of Mr. Bell ought *not* to have been brought in Jessore, but in Furreedpore; and that the thannah in which defendant resided was not mentioned, as it ought to have been, in the plaint; and, lastly, that Mr. Bell had been a defendant in a suit brought by the present plaintiff for a 14 annas share of this very jote, and must, therefore, have known of plaintiff's interest to that extent having been decreed, as that decree was of the 23rd March 1860, and thus before the sale in execution caused by Mr. Bell, which was on the 23rd August 1860. The Principal Sudder Ameen accordingly decreed the plaintiff's suit.

Mr. Bell appealed to the Judge, urging:—

1st.—That, as plaintiffs were not registered in his serishtah, he need not take cognizance of their alleged rights in the jote.

2nd.—That it was for plaintiffs to be aware of the fact that the jote was in arrears, and that there was a decree against the co-parceners for the rent of the *jote* itself, for which the jote was by law liable to sale; and that it was for plaintiffs to take action to satisfy the arrears, if they wished that the tenure should not be sold for those arrears, for which *it*, and not only the rights and interests of the defendants, was hypothecated. It was added that, as Mr. Bell's putnee had to pay its revenue in Jessore, the suit for rent was rightly brought against the co-parceners in that Collectorate.

The Judge, on this appeal, has held that the suit which Mr. Bell brought for arrears of rent ought to have been brought in the *Furreedpore* Collectorate as the lands lie there; that the omission of the name of the thannah was improper, but was not important; but that, as it was not shewn that Mr. Bell, when he got his decree for rent on the 23rd May 1859, was aware that the plaintiffs had any rights (they not getting their decree declaring those rights till the 23rd March 1860, and plaintiffs not being registered in Mr. Bell's serishtah), there was no proof of Mr. Bell's acceptance of plaintiffs' rights in the jote as transferred to them by their decree of the 23rd March 1860; and that, therefore, plaintiffs had no right to sue for the reversal of Mr. Bell's decree of 23rd May 1859, and the sale in execution of the 23rd August 1860, which took place under it. The Judge accordingly dismissed the plaintiff's suit.

The plaintiff appeals specially to this Court, urging, amongst other pleas, that the decree of Mr. Bell of 23rd May 1859, and the sale in execution of the 23rd August 1860, are both illegal and void, as the suit for rent could only have been brought by Mr. Bell as regarded the tenure, and defaulters sued for the rent of it in the district in which the whole jote jummah was admitted to be, *viz.*, in zillah Furreedpore.

Looking to Section 162 of Act X. of 1859, we think this objection legal and valid. The fact of Mr. Bell's paying his putnee-rent for this and other portions of the putnee mehal in the Collectorate of Jessore will not affect the law cited, which clearly prescribes that suits for rent shall be instituted in "*the Revenue Office*" of the district or sub-division in which the cause of action shall have arisen. Now, in this case, the *whole* jote, the non-payment of the arrears of which for 1265 constituted Mr. Bell's cause of action, was admittedly in the Furreedpore district. It is argued that the "Revenue Office" means the Office where the revenue is paid; but not only are these latter terms not apparent in the Section, but the ordinary meaning of the words are the Office of the Revenue *Officer* of the district or sub-division.

In this view of the proper construction and application of the law, it is not necessary to go further into other pleas in special appeal, and we decide that Mr. Bell's decree of the 23rd May 1859, under which the rents of the jote in question in this case for 1265 were decreed to Mr. Bell, and the sale of the jote in execution of that decree on the 23rd August 1860 were totally without jurisdiction, and consequently illegal; and that they must be set aside, and the decree and sale referred to are hereby set aside accordingly.

Plaintiff's special appeal is decreed with all costs in this case here and below.

The 20th May 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Presumption of uniform payment from before Decennial Settlement—Section 16, Act X. of 1859.

Case No. 469 of 1864 under Act X. of 1859.

Regular Appeal from a decision passed by the Deputy Collector of Patna, dated the 23rd September 1864.

Huronath Roy Chowdhry and others (Plaintiffs), *Appellants,*

versus

Bibee Khojeshtah Khatoon (Defendant), *Respondent.*

Baboos Sreenath Doss and *Kalee Mohun Doss* for Appellants.

Baboos Unnoda Pershad Banerjee and *Shib Chunder Mojoomdar* for Respondent.

Suit laid at rupees 5,054-7 as. 4 pie.

Section 16 of Act X. of 1859 does not limit the inference of the presumption of payment from before the Decennial Settlement, only to the best evidence adducible to establish the fact of uniform payment for 20 years.

THE Court below found on satisfactory evidence that a uniform amount of rent for upwards of 20 years was paid by the respondent, and inferred from this fact that the same rents were paid from before the Decennial Settlement, because the appellant had failed to show the contrary.

It is now objected here by the appellant that the decrees filed by the respondent shew a payment at uniform rate only up to 17 years previous to this suit, and no more; and he argues that, under such a state of things, the Court below was not authorized to infer a similar payment beyond the said 17 years. As the Court below found the fact of a uniform payment for more than 20 years upon other credible evidence in addition to the decrees, and, going further back, as the oldest rent-case itself (which, according to the appellant, goes up to the seventeenth year) may, in the absence of any other explanation by the appellant, naturally lead to a conclusion that the rents paid for that year were also the rents long previously paid, and as Section 16 of Act X. of 1859, enacting as a rule of evidence the presumption of payment from before the Decennial Settlement, does not limit the inference of the presumption only to the *best* evidence possible to be deduced for establishing the fact of uniform payment for 20 years, we dismiss the appeal with costs.

The 22nd May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Section 153 of Act X. of 1859—Construction of interest in land—Jurisdiction—Appeal.

Case No. 2676 of 1864 under Act X. of 1859.

Special Appeal from a decision passed by Mr. O. Toogood, Judge of Beerbhoom, dated the 10th August 1864, reversing decision passed by the Deputy Collector of that District, dated the 24th February 1864.

Juggessur Bhuttacharjee and another (Defendants), *Appellants,*

versus

Juggobundoo Nundee (Plaintiff), *Respondent.*

Baboos Kishen Succa Mookerjee and *Nil Madhub Sein* for Appellants.

Baboo Debendro Narain Bose for Respondent.

Section 153 of Act X. of 1859 does not apply merely to questions of proprietary title and interest in land accruing from that title, but applies also to conflicting claims of ryots, *e. g.*, as to which of two ryots is the cultivator or has jotedaree rights.

When a Deputy Collector determines an interest in land, the appeal lies to the Judge, and not to the Collector.

Where in such a case the Judge reverses the Collector's decision as passed without jurisdiction, the Judge should proceed to decide on its merits the appeal as from the decision of the Deputy Collector.

THE plaintiff in this case sues for damages as caused by an illegal distraint. Plaintiff alleges that at a sale for arrears of rent the tenure referred to in this case was sold; and that the principal defendant, one Juggessur, bought it, and, alleging defendant No. 2 to be the tenant, distrained the crops as those of that tenant, ignoring the right of plaintiff as tenant, who had previously held under the title of a superior tenant, one Bhoobunessuree.

Defendant Juggessur alleged that his tenant, defendant No. 2, being in arrears, he duly distrained. Defendant No. 2 alleges that he is the *koorfa* ryot of one Bhoobunessuree, the jotedar before the sale, and pays rent sometimes to her, and, in her absence, to plaintiff.

The first Court (Deputy Collector) put in issue:—*first*, whether plaintiff was the jotedar either himself or by holding under a person who was; and, if so, to what amount of damages plaintiff was entitled?

The Deputy Collector states that the principal defendant bought at the sale *the interests* of the former jotedar, and took kubooleut from defendant No. 2 and others as his ryots, and distrained their crops for

arrears of the first kist. Plaintiff alleged that one Zalim Sheikh was the under-tenant below him, but for the then current year only. Zalim Sheikh and the principal defendant aver that the tenure was for much longer.

The Deputy Collector gave plaintiff a decree for the damages claimed by him.

There was an appeal to the Collector, who held that plaintiff's rights were derived from Bhoobunessuree, and that she having been sold out at the sale for arrears of rent of the *tenure* at which defendant Juggessur purchased the *tenure*, plaintiff's right had ceased and determined. The Collector, therefore, reversed the decision of the Deputy Collector, and dismissed plaintiff's suit.

Plaintiff appealed to the Judge, contending that, as the decision of the Collector to whose jurisdiction in the case, however, plaintiff never objected till he lost his case in that Court) had determined a question of *right and title* to the lands, the appeal should only lie to the Judge, and that the Collector had acted entirely without jurisdiction.

The Judge held that the Deputy Collector had, by his original decision, "determined a question of interest in the land as between parties having conflicting claims to it, and that the Judge alone had the appellate jurisdiction, and not the Collector." The Judge accordingly reversed the Collector's decision. But the Judge passed no further order in appeal on the merits.

It is now contended in special appeal by defendant that there was no determination of title by the Deputy Collector; and that the Collector had jurisdiction, and even, if he had not, the Judge ought to have tried the case on its merits, which he entirely omitted to do.

This is a suit under Clause 7, Section 23 of Act X. of 1859. On the first point, then, our decision must rest on the terms of the law, Section 153 of Act X. of 1859, which provides—"In suits under Clauses 2, 4, and 7 of Section 23, and under Section 24 of this Act, tried and decided by a Collector, *if the amount sued* for or the value of the property claimed does *not exceed one hundred* rupees, the judgment of the Collector shall be final, and not open to revision or appeal except as hereinafter provided, *unless* in any such suit a *question of "right to enhance, or otherwise vary the "rent of a ryot or tenant, or any question "relating to a title to land, or to some in-"terest in land as between parties having "conflicting claims thereto*, has been de-"termined, in which case the judgment "shall be open to appeal in the manner pro-"vided in Sections 160 and 161 of this Act."

Now, in this suit, is there a question of *some interest in land between parties having conflicting claims thereto?* Certainly there is, for plaintiff claims to have an interest in the land from his lease from Bhoobunessuree, and defendant claims to have it from his purchase of the tenure, and his lease to the other defendant, whom he regards as his tenant and as having a tenant's interest in the land. Further, these are certainly conflicting claims. But it is pressed on us that the Section contemplates questions of title properly so called; that is, of proprietary title and interest in land accruing from *that* title, and not the conflicting claims of *ryots*, as to which of two ryots is the cultivator, or has jotedaree rights.

In the first place, we do not think the ordinary meaning of the words bears out in any way this restrictive construction: for the words are most general and unrestricted. In the next place, ryots' tenures are liable to sale, and are sold under the law, and, therefore, the purchaser has an interest in the land when he makes such a purchase.

In this view, then, we think the Judge was right in holding that in this case there was an interest in land determined by the Deputy Collector, which, under Section 153, rendered the appeal to the Judge necessary, and the appeal to the Collector wrong, and the Collector's acts without jurisdiction. We therefore over-rule the objection of special appellant on the point.

On the second point we think the Judge, after holding that he had jurisdiction, and that the Collector had none, should have decided the appeal as from the decision of the Deputy Collector on its merits. We accordingly remand the case to him for re-trial on the merits. Costs of suit to follow the eventual result of the decision on the merits. Costs of this appeal to be borne by special appellant, whose main objection to the decision below has been over-ruled by us. Remand accordingly.

The 22nd May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Suit for Kubooleut—Relation of landlord and tenant.

Case No. 2920 of 1864 under Act X. of 1859.

Special Appeal from a decision passed by Mr. F. Tucker, Judge of Shahabad, dated the 30th June 1864, reversing a decision passed by Mr. J. W. Garstin, Deputy Collector of that District, dated the 31st March 1864.

Poorno Doss and others (Defendants), *Appellants,*

versus

Oojoodhiproshad and others (Plaintiffs), *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Dwarkanath Mitter* for Appellants.

Baboos Kali Mohun Doss and *Romesh Chunder Mitter* for Respondents.

The relation of landlord and tenant is not to be presumed to subsist between the proprietor of land and any person occupying that land, so as to give the proprietor a right, under Clause 1, Section 23, Act X. of 1859, to sue for a kubooleut. That relation constitutes the basis of the jurisdiction of the Collector's Court in regard to its cognizance of suits under Section 23.

THIS was a suit to obtain a kubooleut brought before the Deputy Collector. The defendants set up a lakheraj title.

The Deputy Collector dismissed the plaintiff's suit; but, on appeal, the Collector reversed this decision, and granted the kubooleut.

It is alleged on the part of the defendants that the Collector determined the case solely upon the issue whether or not the land in the defendant's possession was rent-paying land or not; whereas the defendants contended, and still contend before us, that he had no jurisdiction to try such question at all, but ought to have confined himself to the enquiry whether or not the relation of landlord and tenant existed at the time of suit brought between the parties.

On the other side it was urged that this enquiry was not necessary, because there is always such a relation between the proprietor of land and any person who may be occupying that land as to give the proprietor a right under Clause 1 of Section 23 of Act X. of 1859 to sue for a kubooleut. We need not point out the extreme consequences to which such a doctrine would lead; because it has been established by a series of cases that the relation of landlord and tenant constitutes the basis of the jurisdiction of the Collector's Court in regard to its cognizance of suits under Section 23 of Act X. of 1859. The mere denial of this relation by the defendant, or assertion by him of superior title, will not of itself oust the Collector's jurisdiction; but, on that state of things occurring, the Revenue Court is, to use the words of the full Court's judgment in Hurree Persaud Mallee *versus* Koonjoo Beharry Shaha, Marshall's Report, p. 99, "bound to ascertain "on judicial investigation, if the position of "landlord and tenant is proved to exist or "not, and to take jurisdiction or not accord-"ing to the result."

The conclusion to which the Collector has come in this case, as to the plaintiff's right of property in the land, and to the defendant's want of right, does not necessarily involve an answer to the question whether or not the defendants, at the date of suit, stood in the relation of tenants to the plaintiffs in respect to that land. The case must, therefore, go back to the Lower Appellate Court for the determination of this preliminary issue. If that Court determine the issue in the negative, it will decline jurisdiction; but if, in the affirmative, it will enter upon a judicial consideration of the plaintiff's claim, and decide it upon its merits.

The case is accordingly remanded for retrial with reference to the above remarks.

The 22nd May 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Intervention of Lessee.

Case No. 374 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 19th December 1864, modifying a decision passed by the Deputy Collector of that District, dated the 31st August 1864.

Goordyal Paureh and another (Plaintiffs), *Appellants,*

versus

Hurdyal Doss (Defendant), *Respondent.*

Baboo Romesh Chunder Mitter for Appellants.

None for Respondent.

An intervention by a lessee is not the intervention contemplated by Section 77, Act X. of 1859.

THE special appellant sued a person for some rents under a kubooleut stated to have been received by him after his purchase of the lands for which the rents are demanded. The deed was not denied by the defendant. The appellant to the Lower Appellate Court appeared as an intervenor in the Court of first instance, claiming that the lands, alleged by the plaintiff to have been held by the defendant under the kubooleut, were held by him under a mokurruree lease from the vendor of the plaintiff's lessee, the alleged purchaser. The first Court decreed the claim against the defendant on the kubooleut. Against this order the intervenor appealed, and the Lower Appellate Court, believing the statement of the said intervenor, decreed the appeal, and dismissed the claim of the plaintiff. Against this order, the special appellant has appealed to this Court.

The intervention clearly was not one contemplated by Section 77 of Act X. of 1859; and that Act does not expressly provide for any other intervention by a third party. The decree given against the defendant in this case could not prejudice the rights of this intervenor, who had no right to appeal. The plaintiff is entitled to obtain a decree against the defendant who does not object to his claim, and this decree cannot prejudice any right of the intervenor or of any other party.

This appeal is, therefore, allowed with costs, the decree of the Lower Appellate Court being reversed with costs, and the claim of the plaintiff decreed with costs against the defendant in the case.

The 25th May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Order of the Deputy Collector refusing to entertain a suit by reason of non-specification of the Law to which it relates—Judgment—Appeal.

Case No. 2945 of 1864 under Act X. of 1859.

Special Appeal from a decision passed by Mr. H. B. Woodcock, Judge of Bhaugulpore, dated the 26th August 1864, affirming a decision passed by the Deputy Collector of that District, dated the 1st August 1864.

Sheikh Golam Ehya (Plaintiff), *Appellant,*

versus

Lalla Doorga Dyal (Defendant), *Respondent.*

Mr. J. Baptist and *Moonshee Ameer Ali* for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

An order of a Deputy Collector refusing to entertain a suit, because the section of the law to which it relates was not cited in the plaint, is a judgment within the meaning of Section 160 of Act X. of 1859, and an appeal lies from it to the Judge.

Such an order ought to state whether the suit is dismissed or the plaint rejected, and under what Sections respectively.

THIS was a suit for determination of sale. The plaint did not state that the suit was brought under Act X. of 1859, or under any particular Section. On this the Deputy Collector passed the following order:—

"Dated 12th July 1864,

Nuttozooddeen Hossein,

Officiating Mohurir.

P. S.—The petition does not state to what Section this relates. Whereas this petition of plaint is informal, it is ordered that the petition be put up with the record, and the petitioner be informed of the same."

The Judge on appeal recorded this judgment:—

"It does not appear under what Section or how the application or suit, if it is one, was made to the Collector. It does not appear that Act X. or Section 28 was in any way referred to, nor does the Collector's order throw any light on the matter. It is manifest in the present shape no appeal lies."

It is now urged in the petition of special appeal that the order of the first Court is wrong in not entertaining the case, because the Section of the law was not cited, and that the Judge is wrong in holding that there is no appeal.

The special appeal is, however, really against the order of the Judge holding that there is no appeal. Now, the Sections of Act X. of 1859 referring to the Appellate Jurisdiction are these:—

"CL. All the powers vested in the Collector by the preceding Sections of this Act may be exercised by any Deputy Collector in cases referred to him by a Collector, and in all

cases without such reference by a Deputy Collector placed in charge of any sub-division of a district; and all applications and reports allowed or required by this Act to be made to the Collector may be made to any Deputy Collector having such local jurisdiction.

"CLI. In the performance of their duties under this Act, the Collectors and Deputy Collectors shall be subject to the general direction and control of the Commissioners and the Boards of Revenue, and the Deputy Collectors shall be subject to the direction and control of the Collectors to whom they are subordinate. All orders passed by a Collector under this Act, not being judgments in suits or orders passed in the course of suits and relating to the trial thereof, or orders passed after decree and relating to the execution thereof, shall be appealable to the Commissioner, and all such orders passed by a Deputy Collector shall be appealable to the Collector; but no judgment of a Collector or Deputy Collector in any suit, and no *order of a Collector* or Deputy Collector *passed in any suit* and relating to the trial thereof, or after decree and relating to the execution thereof, shall be open to revision or appeal otherwise than as expressly provided in this Act.

"CLX. In all suits other than those in which, when tried and decided by a Collector, the judgment of the Collector is declared to be final, or, when tried and decided by a Deputy Collector, an appeal is allowed to the Collector, an appeal from the judgment of the Collector or Deputy Collector shall lie to the Zillah Judge, unless the amount or value in dispute exceed five thousand rupees, in which case the appeal shall lie to the Sudder Court.

"CLXI. The petition of appeal shall be written on the stamp-paper prescribed for appeals from the subordinate Civil Courts, with reference to the amount or value of the property involved in the appeal, and the rules in force in regard to the time within which appeals from the decisions of such Courts may be received, and to the manner in which such appeals are heard and determined, and to all proceedings which may be had in respect of such appeals, shall be applicable to the Zillah Judge or Sudder Court under this Act."

If the order of the first Court is a *judgment* within the meaning of Section 160, there will be an appeal under that Section to the Judge.

We are of opinion that the order of the Deputy Collector was a judgment passed in a suit under Section 160, and therefore that an appeal will lie to the Judge.

We accordingly reverse the decision of the Court below, and decree this appeal with costs.

The Judge will try the case under the Section cited (160); and we have to observe that the order of the first Court ought to have stated whether the suit was *dismissed*, and, if so, under what *law;* or whether the plaint only rejected, and, if so, what Section applied with special reference to that portion of Act X. of 1859 which prescribes how far the procedure of Act VIII. of 1859 applies to cases under Act X. of 1859.

The 26th May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Lakheraj (Withdrawal from former suit for possession, no bar to subsequent suit for resumption)—Onus probandi (Affirmation of mal title).

Case No. 2982 of 1864 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Mymensing, dated the 26th July 1864, affirming a decision passed by the Deputy Collector of that District, dated the 31st May 1864.

Issur Chunder Shaha and others (Defendants), *Appellants,*

versus

Saroda Soonduree Debia and others (Plaintiffs), *Respondents.*

Baboo Grish Chunder Ghose for Appellants.

Baboo Sreenath Doss for Respondents.

Withdrawal from a former suit for possession of certain land does not bar a subsequent suit for resumption of the same land as invalid lakheraj.

Where a plaintiff, suing for land as *mál*, adds in his plaint that the defendant will set up an invalid lakheraj title, and the defendant really does plead a sunnud, the legal rule as to the burden of proof is not altered, *i. e.*, that the plaintiff, who affirms the land to be his *mál*, must prove that affirmation.

THE first plea put forth in the petition of special appeal is this:—

1st.—"When a suit by the plaintiff's predecessor for declaration of his right to these lands has been dismissed, the present suit does not lie."

This, it is now said before us, means that the matter is "*res adjudicata*," and that thus the plaintiff is barred by Section 2, Act VIII. of 1859.

That Section is—"The Civil Courts shall "not take cognizance of any suit brought on "any cause of action which shall have been "heard and *determined* by a Court of com-"petent jurisdiction in a former suit between "the same parties, or between parties under "whom they claim."

Now, in this case, which is one where plaintiff sues, alleging certain property to be his *mál* land, which he adds defendant improperly claims as lakheraj, it appears that, in a previous litigation, plaintiff having sued for possession, relinquished that claim and subsequently altered it to a prayer for declaration of right, and that claim was dismissed.

On this point the Lower Appellate Court did put in issue "whether this suit is on a question already heard and determined," and held that it had not been so, *i. e.*, that the question as to the validity or otherwise of defendant's lakheraj title had never been tried.

We are of opinion that Section 2 does not bar this suit, for we are not shewn that the plaintiff's claim on the basis of this land being his *mál*, and not defendant's lakheraj, has ever been *determined*.

The second plea taken in the petition of special appeal is that, as plaintiff once sued for and then withdrew from his suit for *possession*, the present suit cannot lie.

We are not aware of, and are not shewn, any law supporting this plea: nor do we think it is one which, as here laid down, *viz.*, as a general and conclusive proposition, can be adopted. We, therefore, reject this plea.

The next point is that the burden of proof has been wrongly put upon defendant, special appellant, to prove his lakheraj title in this case.

Plaintiff sued here on the allegation that the land sued for was a portion of *his mál*. This allegation it was, in our opinion, for plaintiff to prove before defendant was legally bound to set up any title at all. It does not follow by any means that, because plaintiff added in his plaint that defendant had or would set up an invalid title of a lakheraj tenure, and defendant really did plead a sunnud, the legal rule of who should be charged with the burden of proof, is altered. The ordinary proper rule is that, if plaintiff, affirming the land to be his under a title of *mál* proprietor, should be met by a denial of this title, as indeed is the fact here, the necessity of proving that affirmation would be on plaintiff.

We, therefore, think this plea valid.

It is added by special appellant that there is a *khanabaree*, or homestead, which belongs to defendant's share by means of a partition which so allots it, and this the Lower Appellate Court did not adjudicate.

We do not see in the judgment of the Lower Appellate Court that it did adjudicate this point, whereas it is in the grounds of appeal of defendants to the Judge.

In this view of this case we remand it to the Lower Appellate Court that, after throwing the burden of proof on the plaintiff, he will re-decide the case, and at the same time adjudicate the matter of the title to the *khanabaree*.

Remand accordingly.

The 26th May 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Declaratory decree—Cause of action—Limitation.

Case No. 3438 of 1864 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Jessore, dated the 30th August 1864, affirming a decision passed by the Deputy Collector of that District, dated the 29th April 1864.

Hurronath Roy and others (Plaintiffs), *Appellants,*

versus

Gooroodoss Biswas and others (Defendants), *Respondents.*

Baboos Banee Madhub Banerjee and *Sreenath Doss* for Appellants.

Mr. A. F. Lingham for Respondents.

Though a suit may be brought within one year from the date of a declaratory decree, yet that decree is not a cause of action for arrears which the plaintiff might have obtained in the former suit, and which are now barred by limitation.

PLAINTIFF in Bysack 1266 issued notice of enhancement on defendant under Regulation V. of 1812. He shortly after instituted a suit declaratory of his right to enhance at the rate entered in the notice, and obtained a decree in 1269. He, then, in 1270, instituted a suit for the rents of 1266, 1267, 1268,

and 1269, and pleads that he is within time under Section 30 of Act X. of 1859, inasmuch as his suit is brought within one year from his declaratory decree, which is his cause of action.

The first Court found that plaintiff's claim to the rents of 1266 was barred by the Statute of Limitation; that certain payments had been made by defendants for 1267, 1268, and 1269; and with these deductions decreed plaintiff's claim for those years.

The Judge, on appeal, considered the claim for 1266 barred by limitation, and after remarking that the arrears for other years could not be collected in excess of the amount named in the notice, and that the suit of the plaintiff would not bear retrospective effect adverse to the notice, he dismissed the appeal with costs.

Plaintiff has now appealed specially, urging that the claim for 1266 is not barred; that the decision of the High Court in the case* of Joymonee Dossee and others *versus* Huro Nath Roy and others was in point, in which a suit for declaration of right was considered as a cause of action, and a suit for arrears founded on that declaration, and brought within one year from that date, was, under Section 30 of Act X. of 1859, declared to be in time; that the Judge has altogether misdecided the case, and that the Court should rectify the error which has been caused by the Judge's negligence.

* Sutherland's Reports, Act X., Volume II., page 51.

The Judge's decision is, we regret to say, marked by great carelessness and ignorance of the facts of the case. Turning, however, to the objection of special appellant, we decline to consider the action which he brought in the Sudder Ameen's Court as simply declaratory. The plaint in that case is not before us; but, looking to its nature and the circumstances attending it, it was an action not merely asking for a declaration of rights, but admitting of the application of a remedy by way of decree for rent at the enhanced rate. Under this view, as the plaintiff failed to obtain in that action the remedy as to the rents of 1266, which he might have obtained, we cannot allow him now to come into Court, claiming rents which he might before have obtained, and which are now barred by the limitation prescribed by Section 32 of Act X. of 1859, alleging that his cause arose from the decree in the suit in which he has failed to take advantage of the remedy which he might have got in it. We, therefore, think that plaintiff is altogether out of Court as to the claim for the rents of 1266; but he is entitled to so much of the rents of 1267, 1268, and 1269, at the enhanced rate as remains unpaid. On the point of payments no enquiry has been made by the Judge, and the case must be remitted to him for enquiry on this point, and for the passing of whatever orders seem eventually just and proper.

The 26th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Permanent Settlement (meaning of, in Act X. of 1859).

Case No. 194 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 27th August 1864, reversing a decision passed by the Deputy Collector of that District, dated the 29th June 1864.

Sheoburn Lal for self and as guardian of Gooroo Pershad Lal, minor (Defendant), *Appellant,*

versus

Ram Purtab Singh and others (Plaintiffs), *Respondents.*

Baboo Otool Chunder Mookerjee for Appellant.

Baboo Unnoda Pershad Banerjee for Respondents.

The words "Permanent Settlement" referred to in Act X. of 1859 refer to the Permanent Settlement of 1793, and not to Permanent Settlements subsequently made.

THIS was a suit for enhanced rent on the ground that the productive powers of the land had increased other than by the exertions of the ryot.

The defence was uniform payment of rent for 20 years, and a claim to the presumption under Section 4 of Act X. of 1859.

The Judge found that the ryot had never claimed to hold the land at a uniform rate of rent from the date of the Perpetual Settlement, and that, therefore, payment of that rate for 20 years could not advantage him. He decreed the land, therefore, to be liable to enhancement, and remanded the case for settlement of the rates.

It is urged before us, in special appeal, that, as the lands in suit were not permanent-

settled till the year 1860, the special pellant, who had proved payment of rent a uniform rate for twelve years before t time, was protected.

This objection seems to us altogether unable. The words, "Permanent Settlent," referred to in Act X., refer to the rmanent Settlement of Bengal, Behar, and rissa, which was sanctioned in the year 1793. would be absurd to hold that every little tch of accreted chur land, formed a year or o ago only, carries with it all the privileges arded in Act X. to Permanent Settlements de in the year 1790, and gives the ryot, o is lucky enough to get hold of it, the ht to hold at the same rate of rent in petuity.

For the rest we think that the Judge tly dismissed the ryot's claim. He had, his own showing, only held the land ce 1830, and had, therefore, no presump- n in his favor, nor any right to retain his ding at the same rates as those imposed on it when he first took it.

The special appeal is dismissed with ts.

The 26th May 1865.

Present:

he Hon'ble C. B. Trevor, G. Loch, H. V. Bayley, J. P. Norman, and W. Morgan,

Judges.

o appeal—Suits for rent below 100 rupees—Section 77 of Act X. of 1859.

se No. 2779 of 1864 under Act X. of 1859.

cial Appeal from a decision passed by the Judge of East Burdwan, dated the 19th April 1864, reversing a decision passed by the Deputy Collector of that District, dated the 16th September 1862.

Syed Hameedooddeen (Defendant), *Appellant,*

versus

Syed Moulvie Razeooddeen Ahmed (Plaintiff), *Respondent.*

boo Grija Sunkur Mozoomdar and *Moulvie Murhamut Hossein* for Appellant.

boo Kissen Kissore Ghose and *Moonshee Ameer Ally* for Respondent.

o appeal lies to the Judge from a decision passed der Section 77 of Act X. of 1859 in a suit for rent less n 100 rupees.

This case was referred to a Full Bench th the following order :—

Officiating Chief Justice Norman and *Mr. Justice Shumbhoonath Pundit.*—There being conflicting decisions (5th December 1861, Prannath Roy Chowdry *versus* Gugun Bearah; and 28th April 1863, Mohendro Chunder Ghose *versus* Indernarain Holdar, on the one hand; and 10th September 1863, Gopal Chunder Doss *versus* Ram Coomar Ghose, on the other) whether in a suit for rent of less than 100 rupees, where a third party intervenes under Section 77, and the Deputy Collector decides that the plaintiff had been in the actual receipt and enjoyment of the rent up to the time of suit, an appeal lies to the Judge.

We submit this case for the opinion of a Full Bench on the point. Should the Full Bench be of opinion that such an appeal does not lie, the judgment of the Judge will be quashed, and the judgment of the Deputy Collector will stand, and the appellant will get his costs.

Should the Full Bench be of opinion that the Judge had jurisdiction, the appeal will be dismissed with costs.

Decision of Full Bench.—The question for us to determine is whether an appeal from a decision passed under Section 77 of Act X. of 1859, in a suit for a sum in value less than 100 rupees in amount, lies to the Judge.

It is provided by the law just cited that "when in any suit between a land-holder "and a ryot or under-tenant under this Act, "the right to receive the rent of the land "or tenure cultivated or held by the ryot "or under-tenant is disputed; and such right "is claimed by or on behalf of a third person, "on the ground that such third person, or a "person through whom he claims, has ac- "tually, and in good faith, received and en- "joyed such rents before and up to the time "of the commencement of the suit, such "third person shall be made a party to the "suit, and the question of the *actual receipt* "and *enjoyment* of the rent by such third "person shall be enquired into, and the suit "shall be decided according to the result of "such enquiry: provided always that the "decision of the Collector shall not affect "the right of either party, who may have "a *legal title* to the rent of such land or "tenure, to establish his title by suit in the "Civil Court, if instituted within one year "from the date of the decision."

In Section 153 of the same law, it is declared that no appeal shall lie from the decree of a Collector in suits under Clauses 2, 4, and 7 of Section 23, and Section 24, of the Act for a sum less than 100 rupees in value, "unless

"in any such suit a question of right to en-"hance, &c., or any question relating to a title "to land or to some interest in land as be-"tween parties having conflicting claims "thereto, has been determined by the judg-"ment, in which case the judgment is open "to appeal in the manner provided in Sec-"tions 160 and 161."

It has been contended before us that in an enquiry under Section 77 the right to receive rent is investigated; that this right is an interest in land, and that, therefore, an appeal lies to the Judge; but we cannot assent to this reasoning. We think that, under Section 77, the only matter enquired into is the fact of the actual receipt and enjoyment of rent before, and up to the time of the commencement of the suit; that this fact is totally unconnected with the legal title to, or any interest in, the land, or with the right to receive the rent, which is by the proviso of the Section reserved for enquiry in the Civil Court; and that, consequently, no appeal lies to the Judge under Sections 153 and 160 of Act X. of 1859. The view which we take was adopted by two Judges of the late Sudder Court in the case of Bhuggobutty Debee *versus* Shama Churn Banerjee, decided on 1st October 1861, and of its correctness we have not the slightest doubt.

The 29th May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Chota Nagpore—Enhancement—Acts VIII. and X. of 1859—Jurisdiction—Appeal (in suits above 5,000 Rupees).

Case No. 80 of 1865 under Act X. of 1859.

Regular Appeal from a decision passed by the Deputy Commissioner of Maunbhoom, dated the 19th December 1864.

Maharajah Nilmoney Singh Deo (Plaintiff), *Appellant,*

versus

Musst. Shoobhanee Bibee (Defendant), *Respondent.*

Baboos Juggadanund Mookerjee, Ramgopal Ghose, and *Roopnath Banerjee* for Appellant.

Baboos Dwarkanath Mitter and *Unnoda Pershad Banerjee* for Respondent.

Suit laid at rupees 9,608-12 annas.

Acts VIII. and X. of 1859 having taken effect in Chota Nagpore in July and August 1859—HELD that the appeals in suits for enhancement above 5,000 rupees, commenced in June 1861, lie to the High Court, and not to the Judicial Commissioner.

THIS suit is brought up as a regular appeal, filed on the 2nd March of the year 1865, from a decision of the Deputy Commissioner of Maunbhoom, dated the 19th December 1864, in the province of Chota Nagpore. The plaint was filed on the 22nd June 1861, and by it plaintiff sued to assess the lands of defendant at a rent of 9,608-12, from 1268 B. S., as before held at an inadequate jumma, and based his right on an alleged decree of 1849 entitling him to enhance. Defendant pleaded that the lands were held at a fixed rent of 960 rupees as *mokurruree,* and had always paid a uniform rent: further, that the tenure was one created in 1181 B. S. Defendant added that the decree of 1849, relied on by plaintiff, was not one to enhance defendant's land, but only one declaratory of plaintiff's *mál* right.

On the 25th September 1861, the Deputy Commissioner dismissed the plaintiff's suit, holding that plaintiff could not enhance. The plaintiff appealed to the Judicial Commissioner, who held that plaintiff could enhance, and that a decree of June 1849 estopped defendant from denying plaintiff's right to do so. The Judicial Commissioner accordingly reversed the Deputy Commissioner's order on the 30th July 1862, but remanded the case that the fair and equitable rates might be ascertained.

From this decision of the Judicial Commissioner a special appeal (No. 2409) was preferred to this Court, and filed on the 22nd of September 1862. It was heard by this Court on the 3rd July 1863, when Justices Norman and Kemp held that an appeal did lie from the above order of remand made by the Judicial Commissioner, and that the above decision of 1849 relied on by the Judicial Commissioner was not an estoppel, as it was not a decree deciding the right to rent. The remand order is conveyed in these terms:—

"We remand the case in order that the "question of liability of the tenure to en-"hancement may be tried with reference to "the provisions of Act X. of 1859, which "must now govern the case." Upon this remand the Deputy Commissioner has again decreed the case as one to enhance rents of the value of rupees 9,608-12 as. The Deputy Commissioner remarks that after the remand the Judicial Commissioner had fixed that the

issue to be tried in the case was, "whether, "under Section 16 of Act X. of 1859, the rent "of defendant's tenure is liable to enhance-"ment or not." The Deputy Commissioner then ordered the parties to produce any further evidence they wished on that issue; and he decided on the 15th December 1864 that the tenure was declared to be one of 1181 B. S., and that the rent of the tenure had been proved to be a fixed one at 960 rupees, and so held for more than 20 years; further, that plaintiff has not shown his right to enhance according to the provisions of Act X. of 1859. The Deputy Commissioner, therefore, dismissed plaintiff's suit. Plaintiff brings a regular appeal to this Court, and it has been admitted in the Deputy Registrar's Office, apparently because the suit is for a sum above 5,000 rupees, but, on its being called on for hearing, the respondent has, under Section 348, raised the objection that no regular appeal will lie, as the decision of the Deputy Commissioner appealed from by this regular appeal is merely a final decision of the pending suit commenced by the plaint of 1861. It is pleaded by the respondent that the Judicial Commissioner had, under the orders of Government and this Court, dated 19th May 1848, Circular Order No. 3, cited in the margin,* jurisdiction to entertain appeals up to 10,000 rupees, and thus did legally entertain the appeal which he decided on the 30th July 1862. It is added that the decision now come to by the Deputy Commissioner, on the 13th December 1864, is merely a continuation of his decision of the 25th September 1861; and that the plaint just filed is the very plaint, and consequently the suit is the very suit which was pending before the Deputy Commissioner on 25th September 1861. Then it is argued that thus the Judicial Commissioner on the 30th July 1862, and this Court on the 3rd July 1863, did *not* then finally decide the suit; moreover, that the remand order of the Court did not decide the suit or terminate that litigation of which the plaint (one and same as now on record) was the commencement in 1861. Consequently it is said that this is *a pending suit*, and the procedure applicable to pending suits is that under Section 387 of Act VIII. of 1859, which is applicable to suits under Act X. of 1859, and that there was no new suit or new decision by the Deputy Commissioner in 1864. That thus, under the above section, the right of appeal to this Court of the Judicial Commissioner remains, and a special appeal to this Court is the only proper appeal. The Circular Order of this Court, para. 39 of 29th July 1859, is cited, *viz.*—"Where appeals are preferred "from decisions *passed before the 1st of July*, "an appellant would be deprived of any "right in reference to the procedure of the "suit by the operation of Act VIII. of 1859, "the *appeal must be heard under the old* "*law*. A similar rule applies to the ori-"ginal trial of all suits pending when this "Act came into operation, S. C. Cr. Order, "29th July 1859."

* Parties dissatisfied with the decision of an assistant in any original suit of the value of 10,000 Company's rupees and upwards may, within the period of three months from the date of such decision, present a petition of appeal to the Sudder Dewanny Adawlut, or if they prefer it to the assistant himself, whose duty it will then be to forward the petition in the usual manner, and with the least possible loss of time, to the Sudder Dewanny Adawlut.

It was further pleaded that the Calcutta Sudder Court held, on the 28th November 1859, that a suit is pending within the meaning of this Section (387) if when the Code came into operation *anything remained to be done which might have been done under the old law*. Thus, where a petition for review remained to be filed, the petitioner, though beyond the ninety days prescribed by the new law in filing his petition, was entitled to ask the Court to hear it within the period of three months allowed by the old law, that he might not be deprived of a right which, but for the passing of the Code, he would have possessed. It was further pleaded that the Sudder Court had, on the 5th December 1859, held, as to appeals preferred before the enactment of the Code against orders passed in execution of decree, that, as the application of the provisions of this Code to the case would preclude the hearing of appeals, the *old law must govern the case*.

It is contended, on the other hand, that the decision now appealed from to us as a regular appeal *could not* be appealed *otherwise* than in this form, as the value of the suit is above 5,000 rupees, and Acts X. and VIII. of 1859 enact that all appeals in suits above 5,000 rupees must be Regular Appeals from the Court of first instance to *this* Court.

It is admitted by both parties that Act VIII. and Act X. of 1859 took effect in the Chota Nagpore division simultaneously with those Acts coming into operation in all the Lower Provinces of Bengal, commonly called Regulation Provinces, *i. e.*, on the 1st July and 1st August 1859 respectively. The plaint, therefore, of June 1861 must, in our

opinion, be taken to have been one coming under the operation of Act X. of 1859. Consequently we hold that the suit being of a value above 5,000 rupees, the Judicial Commissioner could not, under that Act on the 30th July 1862, proceed to hear the appeal from the decision of the Deputy Commissioner of 25th September 1861. That decision then, being the only one within jurisdiction, must be regarded as final till altered by Regular Appeal. We accordingly dismiss this appeal, which is from a decision passed without jurisdiction, and therefore no decision, with costs.

The 31st May 1865.

Present :

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Jurisdiction—Suits for rent of tenure taken into khas possession by landlord.

Cases Nos. 3123 and 3124 of 1864 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Dinagepore, dated the 9th July 1864, affirming a decision passed by the Collector of that District, dated the 4th January 1864.

Maharajah Jugut Indur Narain Bunwaree Deb Bahadoor and others (Plaintiffs),

Appellants,

versus

Ramsoonder Ghose and another (Defendants), *Respondents.*

Baboo Banee Madhub Banerjee for Appellants.

None for Respondents.

A landlord can sue under Act X. of 1859 for realizing the rents due to his tenant, whose tenure he has taken into khas possession.

In these two cases the plaintiffs took khas possession of the tenure of their tenant under the terms of the contract provided in the lease, and, as trustees for the said tenant, were collecting the rents from the under-tenants and ryots. The Courts below have dismissed these two suits on the ground that such suits cannot be entertained under Act X. of 1859.

We do not agree with the Lower Courts. The plaintiff may be permitted to sue for realizing the rents due to their tenants, whose tenure they have taken into khas possession. The cases are accordingly remanded to the Court of first instance to try them on their merits.

The 31st May 1865.

Present :

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Kubooleuts—Hajuts.

Case No. 398 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 25th November 1864, affirming a decision passed by the Collector of that District, dated the 25th August 1864.

Sheik Tazee Mahomed (Defendant), *Appellant,*

versus

Ruwon Mohun Chowdry and others (Plaintiffs), *Respondents.*

Baboo Kishen Dyal Roy for Appellant.

Baboos Sreenath Doss and *Ashootosh Dhur* for Respondents.

In what cases *hajuts* are allowable from the rents mentioned in kubooleuts.

The Lower Appellate Court has fixed the rates of rent payable by the special appellant with reference to the rates of rent found in the kubooleuts of other neighbouring ryots. With regard to these rates, the special appellant pleaded that the landlord had allowed a large margin of *hajut* from the rates recorded in the kubooleut. The Lower Appellate Court says that this deduction is a mere matter of discretion. The landlords do not allow a *hajut* without a cause either special to the case or general. We do not understand the nature of the *hajuts* allowed in the instances of the kubooleuts relied upon by the Lower Appellate Court. It should fix the rates payable by the special appellant according to the rates actually paid by the neighbouring ryots for similar lands, and not according to rates nominally mentioned in kubooleuts, according to which the rents are not actually realized. If, in certain cases, owing to special cause, any deduction has been allowed upon grounds not applicable to the case of the special appellant, but peculiar to the ryot himself, then the rates mentioned in his kubooleut, provided his lands otherwise are exactly of the same kind with that of the special appellant, should be taken into

deration while fixing the proper rents payable by the special appellant for his lands; but, if it be found that there is a general deduction allowed to all the ryots holding similar lands with those of the special appellant, then it will not be fair to the rates of the rents payable by the special appellant according to the rates mentioned in kubooleuts according to which actually rents are not collected. As the lower Appellate Court has not looked into the subject of *hâjut* in this light, we remand the case to it to re-try the proper rates payable by the special appellant with reference to the remarks recorded above.

The 31st May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Enhancement—Section 13 of Act X. of 1859.

Cases Nos. 1242 to 1250 of 1864 under Act X. of 1859.

Special Appeals from a decision passed by the Deputy Commissioner of Maunbhoom, dated the 24th February 1864, modifying a decision passed by the Extra Assistant Commissioner of that District, dated the 16th October 1863.

Sur Chunder Ghosal (Plaintiff), *Appellant,*

versus

Anhodeb Pandey (Defendant), *Respondent.*

Baboos Tarucknath Sein and *Kalee Prosunno Dutt* for Appellant.

None for Respondent.

Section 13 of Act X. of 1859 only gives a right to sue enhanced rent on due notice, and not the right to sue title to enhance.

In these cases, designated by the above numbers, the Deputy Commissioner dismiss- the plaintiff's claim for rent at enhanced rates under Section 13 of Act X. of 1859, the ground that the notices of enhance- were not given in time. It is objected, special appeal, that he ought at least have given the plaintiff a declaration of to enhance the rent for the future; but are of opinion that the Section in ques- only gives a right to sue for enhanced on due notice, and not a right to sue title to enhance. It was also objected the Deputy Commissioner ought not to found that "it was proved that notice had not been served on the appellant by the respondent within the time prescribed;" because the Court of first instance had not framed and tried any issue on that point. But we think that this question was necessarily in issue before the Deputy Commissioner, and that he had ample evidence whereon to base his conclusion, and both parties had full opportunity to urge their respective cases with regard to this issue, as, in fact, they did. No other ground of special appeal was pressed, and we, therefore, dismiss all the above appeals with costs.

The 7th June 1865.

Present:

The Hon'ble W. Morgan and F. A. Glover, *Judges.*

Jurisdiction—Disputes as to title between plaintiff and intervenor.

Cases Nos. 482 to 487 of 1865 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Dinagepore, dated the 9th December 1864, reversing a decision passed by the Deputy Collector of that District, dated the 11th July 1864.

Belash Monee Chowdhrain and others (Plaintiffs), *Appellants,*

versus

Nobeen Chunder Shaha (Defendant), *Respondent*

Baboos Debendro Narain Bose and *Kalee Kishen Sein* for Appellants.

Baboos Unnoda Pershad Banerjee and *Motee Lal Mookerjee* for Respondent.

Disputes between the plaintiff in a suit for a kubooleut and an intervenor, as to whether the land in question is part of the plaintiff's estate or the ayma land of the intervenor.

THE plaintiff presses for a demand in order that the intervenor's alleged receipt of rent may be investigated (which it has not yet been), and that it may be ascertained if the intervenor has *actually* and in *good faith* received and enjoyed the rent before and up to the time of the commencement of the suit.

The plaintiff sues for a kubooleut, stating that the defendant holds land in his mouzah. The defendant insists that the lands held by him, though locally situated within the plaintiff's mouzah, are, in fact, the ayma lands of the intervenor.

The plaintiff says that the intervenor is not a holder of any ayma lands, but merely a person who held an ijara from the plaintiff of his mouzah, which expired two years ago, since which time the plaintiff has taken proceedings before the Collector, and has

obtained a measurement of the lands in the defendant's occupation.

If there is a substantial dispute between the plaintiff and the intervenor, whether the land in question is part of the plaintiff's mouzah or the ayma land of the intervenor, this is a question for settlement between them in a different suit.

In the present suit, the plaintiff, after the recognition of his right, which seems to be implied from the Collector's order for measurement, may perhaps be entitled to claim a kubooleut; but, if he has not, in fact, ever received rent from the defendant, and if the intervenor can show an actual and *bonâ fide* receipt of rent from the defendant up to the time of suit, the provisions of the 77th Section of Act X. of 1859 must apply. The case is remanded to the Court of first instance for trial. Both parties may adduce such evidence as they wish. The Court should enquire particularly, if the intervenor has actually received rents recently, whether such rent was received in good faith or not, especially having regard to the plaintiff's proceedings before the Collector for obtaining a measurement of the lands.

The 10th June 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Enhancement (grounds of, applicable to dependant Talookdars).

Cases Nos. 462 and 463 of 1865 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Jessore, dated the 1st December 1864, reversing a decision passed by the Deputy Collector of that District, dated respectively the 7th December 1863 and 24th March 1864.

Huronath Roy and others (Plaintiffs), *Appellants,*

versus

Bindoo Bashinee Debia and others (Defendants), *Respondents.*

Baboos Bungsheedur Sein and *Sreenath Doss* for Appellants.

Baboo Hem Chunder Banerjee for Respondents.

The grounds of enhancement stated in Section 51 of Regulation VIII. of 1793, and not those in Section 17 of Act X. of 1859, are applicable to dependant talookdars.

These suits were for enhancement of rent. The defendant pleaded that the notice of enhancement had not been served upon him, and that his rent had not varied since the Decennial Settlement, except that certain additional rent had been added to the original rent on account of certain chakeran lands which had been added to his tenure subsequent to that settlement, as proved by a "*likhon.*"

The first Court held that the service of notice had not been proved, but that the "*likhon*" was not a genuine document; and that, the rent of the talook having varied, the rent could be enhanced.

The Judge on appeal mistakes the opinion of the first Court, and states that it considered the "*likhon*" to be a genuine document, but adds that, though, in his opinion, the "*likhon*" is very suspicious, still no other account has been given as to the cause of the variation of rent in the defendant's talook; and he is, therefore, of opinion that the cause alleged is correct, and that the rent for the original talook has consequently not varied. Further, that the plaintiffs can, therefore, obtain additional rent only on the additional chakeran lands, which were added to the talook after settlement. The Judge, as to the notice, holds that, as the notice comprises a general enhanced rent on all the lands of the talook, it is not sufficient to enable the plaintiff to obtain enhanced rent in this suit.

The plaintiff appeals specially to this Court, and urges that the Judge must either admit or reject the "*likhon*" as evidence; and that, if it is fit to be rejected, being, as the Judge says, a very suspicious document, there is then no further evidence to prove the statement of the defendant as to the cause of the variation in the rent of his talook. We think that this objection is good. The defendant may establish by other evidence the facts stated in the "*likhon;*" and we should think, if these facts are correct, that there could be little difficulty in establishing them. But the Judge cannot both reject the "*likhon*" as evidence, and at the same time act upon it, as he has done. The Judge's decision on the "*likhon*" is not very clear, and, as this suit cannot on other grounds proceed, we reverse his judgment upon it and upon the cause of the variation of the defendant's rent, and leave the whole question open to determination in a future suit.

The defendant, special respondent, under Section 348, objects that the Judge has not decided whether the notice was served

upon the defendant or not, and also that the notice itself is informal; as it is a notice under Sections 13 and 17 of Act X. of 1859, such as might be served on a ryot with rights of occupancy, whereas the defendant is a *talookdar*, the owner of a dependant talook, to whom the grounds for enhancement stated in Section 17 of Act X. of 1859 would not apply, but only the grounds stated in Section 51 of Regulation VIII. of 1793. The Judge and the first Court in their decisions designate the defendant as a talookdar, and his tenure as a talook; and the plaintiff's documents bear out this view of the tenure. This being the case, there can be no doubt as to the informality of the notice. The grounds on which enhancement is demanded are not those on which alone enhancement can be obtained against a dependant talookdar, *viz.*, those contained in Section 51 of Regulation VIII. of 1793. The grounds stated in the notice apply to occupant ryots other than dependant talookdars.

The Judge's decision is reversed, and the plaintiff's suit dismissed in both these cases with all costs.

The 12th June 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Jurisdiction—Appeal to the Judge—Section 77, Act X. of 1859—Decision of first Court on title—Power of Judge to decide whole case.

Cases Nos. 40 to 52 of 1865 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Tirhoot, dated the 21st September 1864, reversing decisions passed by the Deputy Collector of that District, dated respectively the 21st and 31st March, 31st May, 30th June, and 1st July 1864.

Beebee Jameerun (Plaintiff), *Appellant,*

versus

Bhichuk Thakoor and others (Defendants and Objectors), *Respondents.*

Messrs. R. T. Allan and *C. Gregory* and *Baboo Sreenath Doss* for Appellant.

Baboos Unnoda Pershad Banerjee, Dwarkanath Mitter, and *Ashootosh Dhur* for Respondents.

In a suit for rent below 100 rupees, where a third party intervenes under Section 77, Act X. of 1859, if the Deputy Collector decides on the title of the parties, and not on their receipt of rent, the appeal will lie to the Judge.

The Judge having jurisdiction to try the appeal was held competent to determine the whole case, including the question of the receipt of rent, notwithstanding that the law bars an appeal to the Judge on that point.

THESE are all suits for arrears of rent for an amount, in each case, not exceeding 100 rupees. The plaintiff, Musst. Jameerun, the mistress of Brijo Beharee Lal, deceased, is the plaintiff. The defendants, ryots, deny that the plaintiff is entitled to the rent. A third party, Nundo Lal, as the adopted son of Brijo Beharee Lal, has intervened under Section 77 of Act X., alleging that his father has been always in the receipt and enjoyment of the rents now claimed, and that, although Jameerun's name is recorded as the proprietor, she had no real right in the villages, the use of her name being a mere benamee transaction.

The Deputy Collector tried the question as between the plaintiff and the third party, and decided in favor of plaintiff. An appeal was made to the Judge, who reversed this decision, and dismissed the plaintiff's suit, holding that the intervenor had proved that his father, and not Musst. Jameerun, had been in receipt of the rent.

The first ground taken on special appeal is that the Judge had no jurisdiction to try the appeal. It has been lately ruled by a Full Bench of this Court that decisions passed between a plaintiff and a third party under Section 77 of Act X. of 1859, in suits in which the amount of rent claimed does not exceed 100 rupees, are not appealable to the Judge. If, therefore, in this case the Deputy Collector had decided the dispute between the parties under the provisions of that law, the Judge would, in these cases, have had no jurisdiction. But it was contended by Baboo Dwarkanath Mitter, for special respondent, that the Deputy Collector has determined the cases, not by enquiring as to which of the two parties had been in the receipt of the rent, but by enquiring into the titles set up respectively by each, and that consequently under the precedent of the Watson's case, reported at pages 73 to 76, S.D. Decisions for March 1862, the appeals were properly heard by the Judge. The special appellant's vakeel, Mr. Gregory, disputes this statement, and urges that the decision of the Deputy Collector was not upon title, but strictly according to Section 77, as proved by the issue which was laid down. We find that the issue was correctly stated, but the decision is as distinctly upon the

title of the parties as the issue is on their receipt of rent. In such circumstances, we hold, following the above precedent, that appeals did lie to the Judge, and that the Judge had jurisdiction to hear them.

It is, then, contended that, if the Judge had jurisdiction to hear the appeal, he could only reverse the decision of the Deputy Collector, because it had not determined the right question, and that he must, then, necessarily, remand the case to the Deputy Collector for a determination on that question; and that the Judge could not go on to determine himself which party was in the receipt of rent, as in such a case the law barred any appeal to the Judge. It was, however, well argued for the respondent, and, we think, correctly, that the appeal having been properly preferred to the Judge, the procedure which should guide him in hearing that appeal was that laid down in Act VIII. of 1859 (Section 161 of Act X. of 1859), and that, under that procedure (Section 353), the Judge was bound finally to determine the case, if the evidence upon the record was sufficient to enable him to pronounce a satisfactory judgment. The Judge in these cases, though he does not distinctly advert to the point in his judgments, may fairly be presumed to have considered that all the necessary evidence was filed, as the issue had been correctly fixed, and both parties had had opportunity given them to produce all their evidence on that issue. If, then, no other sufficient grounds could be shewn for interfering with his decision, we should not interfere with it on the ground that the Judge could not try the question as to which party was in receipt of the rent. We hold he could try that question.

But it is also urged for special appellant that the Judge's decision is erroneous in three points: *first*, that he has failed to consider several important documents filed by the plaintiff to prove that Brojo Beharee Lal, in his life-time, admitted that Musst. Jameerun was in possession of these rents; *secondly*, that the Judge has improperly rejected the evidence of the plaintiff's putwarry and the jummabundee papers filed by the plaintiff; and, *lastly*, that he has improperly admitted the evidence of the third party's putwarry as an attestation of his jummabundee papers, whereas it is no sufficient attestation.

We think that the first objection is valid, and that the Judge has not alluded in any way, as he should have done, to the important admissions upon which the plaintiff relied as evidence that she was in the receipt of the rent. It is possible that these admissions may be controverted by other evidence, which may satisfy the Judge that the third party, through his father, had been in actual receipt of the rents. But still those documents must be looked to, and a judgment pronounced upon them. We are much dissatisfied also with the judgment of the Judge, and fail to see that the grounds upon which he has come to his conclusion in any way clear up the point as to which of the two parties had been collecting the rents from the ryots up to the time of the institution of the suit, the point to be tried under Section 77. The Judge rejects the jummabundee filed by one side, and admits that filed by the other side, because the one is properly attested, the other is not. The putwarries of both parties appeared to attest those papers, and would, we have no doubt, both have properly attested their papers, had they been properly examined. But it appears that one man was directly examined on the point, the other was not. From one of the judgments recorded in these cases, *viz.*, that from which special appeal No. 51 is preferred, it is evident that there was great suspicion in the examination of the putwarries; the third party's putwarry having by mistake attested the plaintiff's papers. The Judge's decision rests solely on these papers; but the very fact that both parties produce them must have suggested to the Judge that much reliance could not be placed upon such papers. The Judge must enquire into these cases fully and carefully, and satisfy himself on some better evidence than these papers, which party had all along been in receipt of the disputed rents. It is a point on which we should think there could be no very great difficulty in coming almost to a certain conclusion. The ryots are those who paid the rents, and they must be able to point out to whom or for whose benefit they paid those rents. The putwarries cannot both be speaking the truth. They should be cross-examined, and not only required to attest each his own papers. All the evidence in the case must be looked to, and a judgment pronounced, shewing that the whole of the facts of the case have had the earnest attention of the Judge; and that he has really satisfied himself as to which party has been in beneficial receipt of the rents.

We reverse the judgment of the Judge, and remand these cases to him for re-trial, in accordance with the above remarks.

The 19th June 1865.

Present:

The Hon'ble *Sir* Barnes Peacock, *Kt.*, *Chief Justice*, and the Honb'ble C. B. Trevor, G. Loch, H. V. Bayley, C. Steer, J. P. Norman, W. Morgan, F. B. Kemp, W. S. Seton-Karr, Shumbhoonath Pundit, G. Campbell, J. B. Phear, E. Jackson, A. G. Macpherson, and F. A. Glover, *Judges*.

Section 6, Act X. of 1859, retrospective—Enhancement of rent—Suit for Kubooleut—Decree for enhancement—Tender of Pottah—Grounds of enhancement—Construction of the words "fair and equitable" in Section 5—Rule of proportion.

Case No. 2064 of 1864.

Special Appeal from a decree passed by the Judge of 24-Pergunnahs, dated the 10th of May 1864, affirming a decree of the Deputy Collector of that District, dated the 17th of March 1864.

Thakooranee Dossee, widow of Bungshee Dhur Ghose (Defendant), *Appellant*,

versus

Bisheshur Mookerjee and others (Plaintiffs), *Respondents*.

Baboo Dwarkanath Mitter, and *Mr. R. E. Twidale*, and *Baboos Mohendro Lal Shome, Ishur Chunder Chuckerbutty, Unnoda Pershad Banerjee, Mohesh Chunder Chowdhry, Banee Madhub Banerjee*, and *Bama Churn Banerjee*, for Appellant.

Mr. R. V. Doyne, and *Baboos Kishen Kishore Ghose, Hem Chunder Banerjee*, and *Chunder Madhub Ghose*, for Respondents.

Mr. J. T. Woodroffe was heard on behalf of Mr. J. Hills.

Section 6, Act X. of 1859, is retrospective.

A suit to enhance the rate of rent after notice is the proper mode of suing for enhancement of rent. But the same matter may be determined in a suit for a kubooleut.

A suit for a kubooleut may be brought without notice of enhancement (*Peacock, C. J.*, and *Norman, J.*, dissenting). But in such a suit brought without notice, the kubooleut cannot be decreed except to commence with the year following that in which the decree is given.

By Peacock, C.J.,—A suit for kubooleut may be maintained without tendering a pottah (*Norman* and *Phear, JJ.*, dissenting.)

By Peacock, C.J., and *Norman, Kemp, Shumbhoonath Pundit*, and *Campbell, JJ.*—In a suit for a kubooleut at an enhanced rent, the plaintiff is restricted to the grounds mentioned in Section 17.

By the majority of the Court.—In a suit to enhance the rate of rent of a ryot having a right of occupancy under Section 6, the sole ground of enhancement being an increase in the value of the produce, the words "fair and equitable" in Section 5 mean, not the rate obtainable by open competition; but the prevailing rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent. If the customary rate of the neighbourhood has not been adjusted with reference to the increased value of the produce, then the rate of rent to be paid should bear to the old rate the same proportion as the present value of the produce bears to the old value; except in special cases, when this rule may be departed from.

Mr. Justice Trevor.—The plaintiff, in the case out of which the present reference has arisen, sues for a kubooleut from the defendant at a rent higher than that which he has paid in past years, on the ground of the increased value of the produce of the lands.

The defendant claimed to hold at a fixed rent, but his claim has been disallowed, and he has been declared to have only a right of occupancy. With a view of fixing the rent to which the zemindar is entitled, the Division Court has remanded the suit; but in consequence of conflicting decisions on the point, it was in doubt as to the particular principle on which the calculation should be made. It therefore referred the subject to the Court at large in the following terms:—

1st.—When there has been any increase in the value of the produce arising simply from a rise in prices, and not from the agency either of the zemindar or the ryots, and the zemindar is entitled to a new kubooleut from an occupancy ryot for an enhanced rent at fair and equitable rates, is the fair and equitable rate to be awarded that which might be obtained by commercial competition in the market, or is it a rate to be determined by the custom of the neighbourhood in regard to the same class of ryots?

2nd.—If the customary rate of the neighbourhood has not been adjusted with

reference to the increased value of the produce, then on what principle is the customary rate to be adjusted?

Before proceeding to answer these questions, it will be well to notice certain objections which have been taken to the form of the present action. An action for enhancement of rent, it has been contended, can only be maintained after a notice has been formally served on the tenant in accordance with the provisions of Section 13 of Act X. of 1859; that a suit for a kubooleut at an enhanced rate prospectively is not maintainable at all, or, if maintainable, can only be decreed for one year; that under the law the tenant is entitled to know the terms on which he is to be permitted to occupy before he is dragged into Court, whereas by the admission of the suit like the present, the tenant is harassed with law proceedings and law costs, when he has never given the plaintiff any cause of action, and possibly never intends to occupy the lands at all.

These objections, I think, are not well founded. The ordinary and most proper mode of proceeding to be adopted by a zemindar or other person wishing to enhance the rent of his tenant is, doubtless, by a notice under Section 13 in the first instance, and then by a suit for the recovery of that rent, to be brought within the term specified in the proviso at the end of Section 32 of Act X. 1859; but it appears to me that it is also competent to a zemindar or other person to bring an action for a kubooleut, and in that form to raise the question as to the particular enhanced rate at which the pottah and kubooleut shall be exchanged between the parties. Suits for the delivery of pottahs or kubooleuts are both expressly recognized in Section 23, and also in Sections 80 and 81 of Act X. of 1859. It is true that Section 76 only gives the Collector power to fix the term in suits for the delivery of a pottah; but regarding, as I do, the suit for a kubooleut as the correlative of the suit for a pottah, I think that by implication this Section applies equally to both classes of suits, and this without any detriment to the ryot who, under Section 19, can, after notice given at any time, relinquish the land held by him. As to the argument drawn from the supposed hardship to the tenant arising from his being brought into Court unnecessarily and without having given plaintiff any cause of action, I would observe that, if the present action were one founded on an injury already actually committed, and were brought without any notice or demand, there would be no ground for the contention now raised; and regarding this action simply as a declaratory one brought, that is, for the Court's determination as to the amount of enhanced rent to be paid from the beginning of the year subsequent to the passing of the decree, I think that the suit itself is in the nature of a demand, and that the answer of the defendants objecting to the claim made is equivalent to a repudiation of that demand, rendering him liable, in case his contention fails, to be saddled with the costs of the action, which, of course, he would not have been, had he admitted the right claimed by the plaintiff prospectively.

Whether, in suits like the present, grounds for enhancement beyond those stated in Section 17 are admissible, is a point not legitimately raised before the Court, the ground for enhancement on which the present suit is based being one of those expressly mentioned in that Section of the law. I therefore decline to enter into a consideration of this point in the present reference.

In determining the question proposed to the Court, it will be necessary, in the course of my remarks, to consider briefly the relative right of the Government, zemindars, and ryots in Bengal, before the enactment of Act X. of 1859; *2nd*, the effect, if any, which Act X. had on the previous relation of zemindars and ryots; and, *3rdly*, the principle which, under the circumstances set forth in the question put to the Court and under their present relation, should be adopted in the adjustment of their rents.

It might be sufficient, when considering the first point above noted, to limit myself to the relative rights of Govern-

ment, zemindars, and ryots with a right of occupancy, as gathered from the Regulations of Government passed in 1793 and subsequent years. As, however, the learned Counsel and pleaders have turned the Court's attention to the state of things existing before the Decennial Settlement, I propose to make a few remarks on that period.

The earliest authentic records seem to point to a state of things in which the gross produce of the soil was, in some places, of right shared between the king, the village landholders, and the permanent or the khood-kasht tenants who cultivated the lands of the village in which they resided, retaining them during their lives, and transmitting them to their descendants; and in others, in which there were no village landholders between the king and the aforesaid tenants. At the time of Menu, the proportion legally claimed by the king was one-sixth; and, so long as the demand of the State was fixed, the profits of the village communities and permanent tenants remained unchanged; but when the State, as was afterwards the case, raised its demand on the produce, the profits of the other sharers in the produce diminished in an equal proportion.

In the state of things described above, property, says an able historian of India, in the English sense of the term, that is, the exclusive use and absolute disposal of the powers of the soil in perpetuity, was in no one person: each party was equally entitled by right to a share of the produce, and the practical question under such circumstances is, not in whom property resides, but what proportion of the produce is due to or claimable by each party.

Mountstuart Elphinstone, Vol. I., Chap. 2.

Coming to later times, we meet with the class of persons, the predecessors and ancestors of the zemindars of the Perpetual Settlement, who seem not to have had any existence before the time of the Mahomedan conquest. The Sovereign and the permanent or khood-kasht tenants are always present, and in parts of the country other than Bengal the village landholders, who all, in different proportions, receive their shares of the produce. It would be out of place to enter into an antiquarian discussion as to the rights of the zemindars, whether they were public servants filling a conditional office generally renewable and revocable on defalcation, but conveying no right of property in the grantee, the sovereign ruler being the sole proprietor of the soil, in right and fact the real actual landlord—or whether, even if they did not originally possess, they did not acquire in course of time a property in the soil, and the right annexed thereto of disposing of it by sale, gift, and mortgage, subject, however, under any mode of alienation, to the Sovereign's claims for revenue. It will be sufficient to cite here, and to accept as sufficiently accurate for present purposes, the definition of a zemindar given by Mr. Harrington. "A zemindar," says that gentleman, "appears to be, under the Mogul constitution and practice, a landholder of a peculiar description, not definable by any term in our language; a receiver of the territorial revenue of the State from the ryots and other under-tenants of the land, allowed to succeed to his zemindaree by inheritance, yet generally required to take out a renewal of his title from the Sovereign or his representative, on the payment of a fine of investiture to the Emperor, and a nuzurana or present to his provincial delegate the Nazim; permitted to transfer his zemindaree by sale or gift, yet commonly expected to obtain previous special permission; privileged to be generally the annual contractor for the public revenue received for his zemindaree, yet set aside with a limited provision in land or money when it was the pleasure of Government to collect the rents by separate agency, or to assign them temporarily or permanently by the grant of a Jagheer or Altumga; authorized in Bengal since the early part of the 18th century to apportion to the pergunnahs, villages, and lesser divisions of land within his zemindaree, the abwab or cesses imposed by the Soobadar usually in some proportion

Vol. III., page 400.

to the standard assessment of the zemindaree established by Torun Mull and others, yet subject to the discretionary interference of public authority either to equalize the amount assessed on particular divisions, or to abolish what appeared oppressive to the ryot; entitled to any contingent emoluments proceeding from his contract during the period of his agreement, yet bound by the terms of his tenure to deliver in a faithful account of his receipts."

The settlement of Torun Mull alluded to in this extract was, according to Sir John Shore, formed by collecting, through the medium of the Canoongoes and other inferior officers, the accounts of the rents paid by the ryot, which served as the basis of it. It was made about 1582, and remained essentially in force for very many years. Under it, in accordance with the principle of Mogul Finance, the gross produce of land was divided in certain proportions between the Sovereign and the husbandmen, the share of the former being from one-half to one-eighth of the gross produce, according to circumstances, and the zemindars with whom the settlement generally was made receiving in Bengal a portion of the land or its produce for their use and subsistence under the name of Nankar, which did not in the aggregate exceed one per cent. of the revenues collected by them. The rate of rent or revenue to be paid by each ryot under the settlement of Torun Mull, and which represents a portion of the gross produce converted into money, was, in after time, designated the *ussul* or original rate, to distinguish it from those taxes or cesses which were subsequently imposed, and which, though not, speaking generally, directly raised from the land, yet immediately or mediately pressed upon its cultivators. The origin of these cesses is not quite clear. Whether they were originally devised by Government as a means of raising the revenue of the State, or whether, having been, in the first instance, devised by the zemindars as an unauthorized means of increasing their emoluments, they, on being discovered, gave the Government Officers a hint as to a mode in which the demands of the State could be effectually raised, it is not very material now to enquire. It is quite clear that, however originating, from the time of Jaffir Khan, that is, since the reign of Aurungzebe at the beginning of the 18th century, they became an acknowledged Soobadaree impost. They were in general levied upon the standard assessment in certain proportion to its amount; and the zemindars who paid them were authorized to collect them from their ryots in the same proportion to the rents paid by them. When the value of the produce of the land remained the same as it had been previously, their imposition operated as an arbitrary enhancement of rent, which would not have been the case had the increase in the demand always arisen from an increase in the value of the Government share of the produce when measured in money. An increase of this nature, to a certain extent, must have taken place, according to the best authorities, between the time of Torun Mull and that of Jaffir Khan from the extension of commerce and the influx of silver into the country; and it is not improbable that it may have had the effect of making these impositions less severely felt by the tenantry than they otherwise would have been. But, be that as it may, it remains, as observed by Mr. Mill, a fact "that, though the demands of the great landholder, the State, were swelled by fiscal rapacity, it was thought necessary to have a distinct name and a separate pretext for each increase of exaction, so that the demand has sometimes come to consist of thirty or forty different items in addition to the nominal rent. This circuitous mode of increasing the payments assuredly would not," proceeds Mr. Mill, "have been resorted to, *if there had been an acknowledged right in the landlord to increase the rent. Its adoption is a proof that there was once an effective limitation, or real customary rent, and that the understood right of the ryot to the land, so long as he paid rent according to custom, was at some time or other more than nominal.*"

It is useless to attempt to trace right principle during the last years of Maho-

medan rule in Bengal. The only principle of action traceable throughout is a determination on the part of the ruling power to exact by means of arbitrary imposts as much rent as possible from the zemindars or farmers of revenue as might be. "The mode of imposition," as remarked by Sir John Shore, "was fundamentally ruinous both to the ryots and zemindars; and its direct tendency was to force the latter into extortion, and all into fraud, concealment, and distress."

Sir John Shore's Minute of June 1789, page 44.

It does not appear that, after the acquisition of the Dewanny by the East India Company, any marked improvement in the method of apportioning the share of the produce of the land between the parties entitled to it was made. The Settlement, sometimes quinquennial, but generally annual, was made sometimes with the zemindar, who, according to the preamble of Regulation II. of 1793, after the deduction of the expenses of collection paid over ten-elevenths of the net rents of his property as revenue to Government, retaining the remaining one-eleventh as his zemindaree profits—and sometimes with strangers, who at auction bid over the head of the zemindar himself. In this case the zemindar received the profits of his Nankar land, or some particular sum payable either by the farmer or from the public treasury; and the farmer, in order to enable him to meet his engagements with Government, frequently made without sufficient regard to the assets of the property which he had obtained in farm, resorted to every sort of exaction over his temporary tenants. This state of things was rendered worse by the ingenuity of the native collectors of Government, "who," to use the words of Government, "in 1786, had endeavoured to confound the limits of different districts, to vitiate accounts, to increase old Abwabs, and to superadd new ones, and, in short, to involve oppression in such mystery and difficulty as nearly to defeat and set at defiance all attempt at detection."

It was in the midst of this state of things that the Decennial Settlement was determined on, which afterwards became perpetual. Its object was to fix the Government demand, to fix the demand which the zemindar should make on his tenants, and to guarantee to the zemindar the profits arising from his bringing waste lands into cultivation, and inducing the ryots to cultivate the more valuable articles of produce. The rents of an estate can only be raised, remarks Lord Cornwallis, by inducing the ryots to cultivate the more valuable articles of produce, and to clear the extensive tracts of waste land which are to be found in almost every zemindary in Bengal.

Lord Cornwallis' Minute, dated the 3rd February 1790, Vol. II., p. 185, Harrington's Analysis.

By this Settlement the demand of the State was fixed for ever, thus at once remedying, perhaps too decisively and adversely to itself, the evil which had become chronic in Bengal, arising from the uncertainty in the share of the produce which the Government might claim as its own. The Government, moreover, has asserted in the preamble of the Regulations XIX. and XLIV. of 1793 its right to a share of the produce of every beegah in Bengal, assessed and unassessed, unless held lakheraj under a valid grant, or, in other words, unless Government has transferred its right to shuch share to individuals for a term or in perpetuity; and it has limited its demand in perpetuity over all assessed estates to the sum that, under the Settlement, was assessed upon them, leaving *the zemindar to appropriate to his own use the difference between the value of the proportion of the annual produce of every beegah of land which formed the unalterable due of Government according to the ancient and established usage of the country, and the sum payable to the public.* It has declared, moreover, that the zemindars, whatever they may have been originally, and however liable heretofore to be displaced from their estates with the bare pittance of Nankar or other small allowance, are the actual proprietors of the soil, and that, as an implied consequence, they will not be liable to be ejected from their estates, but that, on failure to pay the revenue assessed

upon them, their estates, or portions of them sufficient to meet the Government demand, will be brought to sale. Government, moreover, expressed a trust that, sensible of the benefit thus conferred on them, the zemindars would exert themselves in the cultivation of their lands (a considerable portion of which was then under jungle), under the certainty that they would enjoy exclusively (that is, without the interference of Government) the fruits of their own good management and industry; and Government reserved to itself the power, acting under the duty which belongs to it as ruling power, of protecting all classes of people, and more particularly those who from their situation are most helpless, of enacting, whenever it might deem it proper, such Regulations as it might think necessary for the protection and welfare of the dependant talookdars, ryots, and other cultivators of the soil; and it declared that no zemindars, independent talookdars, or other actual proprietors of land, shall be entitled on this account to make any objection to the discharge of the fixed assessment which they have respectively agreed to pay.

Regulation I., 1793.

These words clearly show that, though recognized as actual proprietors of the soil, that is, owners of their estates, still zemindars and others entitled to a settlement were not recognized as being possessed of an absolute estate in their several zemindarees; that there are other parties below them with rights and interests in the land, requiring protection just in the same way as the Government above them was declared to have a right and interest in it which it took care to protect by law; that the zemindar enjoys his estate subject to, and limited by, those rights and interests; and that the notion of an absolute estate in land is as alien from the Regulation law as it is from the old Hindoo and Mahomedan law of the country.

What, then, are those rights and interests recognized by law belonging to the ryots—for with them we are alone concerned—which limit and control the right of the zemindar in his own estate? At the time of the Decennial Settlement, the ryots were, in Bengal as in other parts of India, divided into khood-kasht or resident, and py-kasht or non-resident. It has indeed been contended before us that time is of the essence of a khood-kasht tenure; that a ryot, simply residing in a village in which his land is, is not a khood-kasht ryot; and that, in order to constitute a khood-kasht ryot under the Regulations, he must be a resident hereditary ryot; and that, if he has not succeeded by right of heirship, he does not fall within that class of tenants. But it appears to me that, whether we look to the etymology of the word or to the thing itself, there is no reasonable ground for question. Khood-kasht ryots are simply cultivators of the lands of their own village, who, after being once admitted into the village, have a right of occupancy so long as they pay the customary rents, and therefore with a tendency to become hereditary, and with an interest in the produce of the soil over and above the mere wages of labor and the profits of stock, in other words, above the cost of production.

These tenants seem, at the Settlement, practically and legally, though not by express Statute, to have been divided into two classes, the khood-kasht kudeemee, and the simple khood-kasht, or those who had been in possession of the land for more than 12 years before the Settlement, and those whose possession did not run back so long. Both by the Hindoo and Mahomedan law, as well as by the legal practice* of the country, 12 years had been considered sufficient to establish a right by negative prescription, that is, by the absence of any claim on the part of other persons during that period, and hence the doctrine which has obtained that khood-kasht ryots in possession 12 years before the Settlement were, under no circumstances, not even on a sale for arrears of revenue, liable either to enhancement of rent, or eviction from their holding, so long as they paid the rents which they had all along paid. The existing leases of khood-kasht ryots at the time of the Settlement, who had no prescriptive rights,

* Colebrooke's Digest of the Regulations, Vol. III., page 4.

were, with certain exceptions, specified in Section 60 of Regulation VIII. of 1793, to remain in force until the period of their expiry; and those ryots were entitled to renewal of their leases at *Pergunnah rates*;* and on a sale for arrears of revenue such ryots were entitled to a new settlement at the Pergunnah rates, and could be evicted only after declining to enter into engagement with the purchaser *at the same rates*† It may here be observed that written engagements between the tenants and other parties were not the custom of the country. The entry of the tenants' names, and of the rents in the papers of the village accountants, was the only evidence of title which the great majority of the tenants in the country then held. The Regulations of 1793 attempted, but ineffectually, to introduce generally the system of the exchange of written engagements between the zemindars and their tenants.

*Section 7, Regulation IV. of 1794.

†Section 5, Regulation XLIV. of 1793.

Clause 5, Section 29, Regulation VII. of 1799.

Khood-kasht ryots, whose tenancy *commenced* subsequently to the Decennial Settlement, are entitled to hold on at the rate which they have either expressly or impliedly contracted to pay during the incumbency of the zemindar who granted the pottah and his representatives, whatever that rate may be;‡ and on a sale for arrears of revenue, they also are entitled to a renewal of their leases by a purchaser at the *Pergunnah rate*. Should the rate in the engagement cancelled by the sale have been below that figure, they can only be evicted on refusing to renew at the Pergunnah rates. Moreover, it was enacted generally by Section 6 of Regulation IV. of 1794 that, if a dispute arises between the ryots and the persons from whom they may be entitled to demand pottahs regarding the rates of the pottahs, *it should be determined in the Dewanny Adawlut of the Zillah in which the lands were situated according to the rates established in the Pergunnah for lands of the same description and quality as those respecting which the dispute arose.*

‡Section 5, Regulation XLIV. of 1793.

Section 7, Regulation IV. of 1794.

Clause 5, Section 29, Regulation VII. of 1799.

The Legislature, as just now observed, was in 1793 anxious to encourage the exchange of pottahs and kubooleuts between the zemindars and their tenants; but so fearful was it, lest, from weakness or improvidence, the zemindars just recognized as actual proprietors should injure their own properties, and also endanger the stability of the Government revenue by granting long leases at *insufficient rents*, that it restricted the period for which leases could be granted to 10 years, renewable in the last year for another period of 10 years.* This law remained in force till 1812, when, by Regulation V. of that year, Section 2, the above restriction was taken off, and zemindars were declared competent to grant leases for *any period* which they might deem most convenient to themselves and tenants, and most convenient to the improvement of their estates. Moreover, by Regulation XVIII. of the same year, it was explained, in consequence of certain doubts which had arisen on the construction of Section 2 of Regulation V. of 1812, that the true intent of the said Section was to declare proprietors of land competent to grant leases for any period, even to perpetuity, and at any rent, which they might deem conducive to their interests.

* Section 2, Regulation XLIV. of 1793.

This law did not, however, expressly or by implication override the rights of khood-kasht ryots to hold at Pergunnah rates. It simply declared that, having regard to the rights of others, the zemindar might grant leases for any period or any rent, be it high or be it low, provided the tenants were willing to pay it, and he to take it. Again, by Section 2 of Regulation VIII. of 1819, it was declared that all leases and engagements for the fixing of the rent now in existence, that may have been granted or concluded for a term of years or in perpetuity, by a proprietor under engagement with Government, or other persons competent to grant the same shall be deemed good and valid tenure, notwithstanding that the same may have been executed before the passing of Regu-

lation V. of 1812, and while the rule of Sec. 2 of Regulation XLIV. of 1793 above alluded to, was in full force and effect.

Thus, then, the khood-kasht ryots, though they were entitled to pottahs at the Pergunnah rates by the laws of 1793 and following years, and though, under Section 6 of Regulation IV. of 1794, the Courts were, in case of disputes, to determine the rate of the pottah according to those rates, still, under the operation of the laws above cited, ryots might, if they pleased, bind themselves by specific engagements irrespective of those rates; and, of course, having done so voluntarily, they would be held strictly to the terms of their engagement. As I have observed above, it had become the practice of the Government for the time being to collect various imposts from the zemindar, who again was entitled to collect them from the ryots; and, from their number and uncertainty, they had been intricate to adjust, and a source of oppression to the tenants. These also were entered in the paper on which the Decennial Settlements were based, and consequently had been legalized and recognized by it. By Section 54 of Regulation VIII. of 1793, all proprietors of land and dependant talookdars were required to consolidate these charges with the *ussul* or original rate into one specific sum. And by Section 55 of the same law, proprietors and farmers of lands of whatever description were prohibited from imposing any new Abwab or Muhtoot on the ryots, and a penalty was enacted in case of any infringement of the prohibition.

When then the term Pergunnah rate occurs in the Regulations of 1793, 1794, and 1799, in connection with khood-kasht ryots, the question arises, is it confined to the particular portion of the produce of land to which, by the custom of that Pergunnah, the demand of the zemindar is limited, or does it include also the Abwab recognized by Regulation VIII. of 1793 which has become consolidated with it? The Court has been told, indeed, that the Pergunnah rate never meant anything; that it was a mere myth; but that, if it did mean anything, it was only another term for the zemindar's discretion or moderation; and that, even if those rates existed in 1793, they had become well nigh obsolete in 1812; for although, by Section 6 of that law, it is enacted that established Pergunnah rates, where such existed, shall determine the amount to be collected by Government Officers and purchasers at sales for arrears of revenue, still by Section 7 it is enacted that, in cases in which no established rates of the Pergunnah or local division of the country may be known, pottahs shall be granted and the collections made according to the rate payable for land of a similar description in the places adjacent. I cannot assent to the doctrine that the Legislature in 1793 and the following years used terms without meaning, and directed the Court to settle disputes according to a rate which then had no existence. I must rather conclude that the terms which the Legislature used to denote the rate which was to form the limit of the zemindar's demand represented something real and distinct at that period; and, although in the shape of a Pergunnah rate, the limit on the zemindar's demand had become by 1812, in some places, indistinct, still the limit existed in the shape of the rate *which was payable for lands of a similar description in the places adjacent*—a rate which is in fact the same thing with the Pergunnah rate under a different form—the customary rent deduced from the similar rate paid in places adjacent rather than from a rate current in the Pergunnah.

Reverting, then, to the question, what the words Pergunnah rate, as used in the old laws, meant, I have no hesitation in holding that it must be considered to mean the *ussul* or original rate, the rate of Torun Mull, together with the Abwab which had been subsequently levied from the tenants and recognized by the Settlement. It is true that these two quantities joined together did not probably exactly represent that share of the produce calculated in money which, under a pure system of customary rents, would have been developed; but, judging from the increased wealth of the country, which had, from commerce and the influx of precious metals, resulted between the

time of Torun Mull and the Decennial Settlement, the assessment which had been increased in one form did not probably differ widely from what it would have been had the other and natural mode of calculating the increase been adopted. Since the Decennial Settlement, however, the rates of rent have adjusted themselves to the varying prices of the produce irrespective of any extraneous demand; and the terms used in Regulation V. of 1812 have regard to the varying rates in the different localities which have resulted solely under the increased activity and industry caused by the comparative security obtained under the Permanent Settlement.

To suppose that a Pergunnah or local rate of rent could be permanently fixed in amount *when the circumstances of the country were improving*, is to suppose an impossible state of things. The proportion of the produce calculated in money payable to the zemindar, represented by the Pergunnah or local rate, remains the same; but it will be represented, under the circumstances supposed, by an increased quantity of the precious metals.

The rates of rent, then, which khood-kasht ryots *under the old Regulations* were liable to pay, independent of contract, remained in all cases, whether under a purchase at a sale for arrears of revenue, or otherwise, fixed either at the Pergunnah rate, the rate payable by land of a similar description in the places adjacent, or at rates fixed according to the law and usage of the country; and they were entitled to hold their lands so long as they paid those rates. But, when Regulation XI. of 1822 was passed, the use in Section 32 of that law of the terms khood-kasht kudeemee ryot, or resident and hereditary ryot with a prescriptive right of occupancy, to designate the cultivator who would not be liable to eviction on a sale for arrears of revenue, gave rise to the doctrine that khood-kasht ryots who had their origin subsequent to the Settlement were liable to eviction, though, if not evicted, they, under Section 33, could only be called upon to pay rents determined according to the law and usage of the country, and also that the possession of all ryots whose title commenced subsequent to the Settlement was simply a permissive one, that is, one retained with the consent of the landlord.* Again, by Act XII. of 1841, and Act I. of 1845 (which repealed the former), a purchaser acquired his estate free of all encumbrances which had been imposed on it after the time of the Settlement; and he is entitled, after notice given under Section 10 of Regulation V. of 1812, to enhance *at discretion*, anything in the Regulation to the contrary notwithstanding, the rents of all under-tenures in the said estate, and to eject all under-tenants with certain exceptions, amongst which are khood-kasht kudeemee, but not simple khood-kasht ryots. It follows that these laws distinctly gave the purchaser the power to eject a khood-kasht ryot whose tenure was created after the Permanent Settlement, and, if not ejected, they are liable to be assessed *at the discretion of the landlord.* This word "discretion" entirely annihilated the rights of the khood-kasht tenants created subsequent to the Settlement in estates sold under these laws. It reduced them from tenants with rights of occupancy, so long as they paid the established rate of the Pergunnah, or the rate which similar lands paid in the places adjacent, into mere tenants at the will of the zemindar, who might in any year eject them, and place in their stead any tenant competing for the land. It is, in short, introducing into this country competition in the place of customary rents.

As to py-kasht ryots they are nowhere expressly mentioned in the laws referring to Bengal. If they held under pottahs at the time of the Settlement, they were entitled to hold them till the expiry of the lease under the comprehensive terms of Clause I., Section 60, Regulation VIII. of 1793, which included even them. In Section 10, Regulation LI. of 1795, which referred to Benares, they are expressly mentioned, and they are declared to be equally entitled with khood-kasht ryots to have their pottahs renewed at the established rates, provided the proprietor or farmer chooses

* S. D. Decisions for 1856, pp. 617 to 628.

to permit them to cultivate the land held by them, which they have the option to do, or not to do, as they think proper, on the expiry of all py-kasht leases. In Bengal the rates of py-kasht ryots at the present date, though it seems to have been different formerly, are generally above the Pergunnah rates. They have always been considered to have no rights independent of the particular engagements under which they hold; and those being cancelled, they are liable to immediate eviction.

Such was the state of the law when Act X. of 1859 was passed, under the power, it may be presumed, which the Governor-General in Council had reserved to himself in the 7th Article of the Proclamation inserted in Regulation I. of 1793, of enacting, whenever he might deem it proper, such Regulations as he might think necessary for the protection and welfare of the ryots and cultivators of the soil. They were, in the opinion of the Legislature, insufficiently protected; hence the new law which re-enacted with modifications certain old laws, rescinded by it, and which, moreover, as we shall see presently, interfered with the rights of the zemindars as laid down in the legislation of the last thirty years.

By the first Section of this Act are rescinded all those Regulations which laid down the rights of khood-kasht or permanent resident royts; Regulations IV. of 1794 and V. of 1812, as to the rates at which they were entitled to pottahs, were repealed, and such parts of Section 26 of Act I. of 1845 (by which Law Act XII. of 1841 was repealed) as related to the enhancement of rents and the ejectment of tenants by the purchasers of an estate sold for arrears of Government revenue, was modified; and it was enacted by Section 3 that ryots who hold lands at fixed rates of rent, which have not been changed from the time of the Permanent Settlement, are entitled to receive pottahs at those rates; and by Section 4, *proof,* that the rent has not been changed for 20 years, raises the presumption that the land has been held at that rent from the Permanent Settlement. By Section 5 it is enacted that ryots having right of occupancy, but not holding at fixed rates, as described in the two preceding Sections, are entitled to receive pottahs at *fair and equitable rates;* and, in case of dispute, the rate previously paid by the ryot shall be deemed to be fair and equitable, unless the contrary be shown in a suit by either party under the provisions of this Act. Then follows Section 6, by which it is enacted that "every ryot who has cultivated or held land for a period of 12 years has a right of occupancy in the land so cultivated or held by him, whether it be held under pottah or not, so long as he pays the rent payable on account of the same; but this rule does not apply to khamar, nij-jote, or seer land belonging to the proprietor of the estate or tenure, and let by him on lease for a term, or year by year, nor (as respects the actual cultivator) to lands sub-let for a term or year by year by a ryot having a right of occupancy. The holding of the father or other person, through whom a ryot inherits, shall be deemed to be the holding of the ryot within the meaning of this Section." Section 7 declares that "nothing contained in the last preceding Section shall be held to affect the terms of any written contract for the cultivation of land entered into between a landholder and a ryot, when it contains any express stipulation contrary thereto; and Section 8 declares that "ryots not having rights of occupancy are entitled to pottahs only at such rates as may be agreed on between them and the persons to whom the rent is payable."

All ryots, then, whether khood-kasht or py-kasht, with the right of occupancy, are, under Section 6 of this law, entitled to pottahs at *fair and equitable rates:* and the point which we have eventually to determine is the meaning to be given to the words "fair and equitable" under the circumstances of the present case. Before, however, proceeding to the determination of that point, a preliminary difficulty has to be settled. It has been urged before the Court that Section 6, in whatever way it be read, affects the vested rights which zemindars have under existing

laws, in their lands held by ryots who may occupy it for 12 years; that whereas those persons had no right of occupancy at all previously, but were mere tenants-at-will, the Legislature gives that right to them now after 12 years' occupancy only; that, consequently, the law should be read, not retrospectively, but prospectively, that is, it should be read in such a manner as to give the zemindar an opportunity to avoid its, to him, disadvantageous enactments, and in such a way as to infringe as little as possible on his vested rights; and the case of Moore *versus* Durden has been cited to us as an authority. Undoubtedly, with reference to past transactions and to such as are still pending, laws should be constructed as prospective, not as retrospective, unless they are made expressly applicable to them; but in the present instance the Court has to deal, not with past transactions, but with the *status* or condition of persons; and the Court has only to determine whether the Legislature intended to, and did in furtherance of that intention, declare or enact that the *status* or condition of a ryot with right of occupancy should be held by or given to all ryots who might either at the passing of the Act have occupied, or might at any time, partly before and partly after its enactment, occupy for 12 years; or whether it simply enacts that 12 years' continuous occupancy *subsequent* to the passing of the Act should confer that condition on every ryot so holding. This point must be determined with reference to the terms of the law and the intent of the Legislature as gathered therefrom.

After having attentively considered the point raised before the Court, and keeping in mind the magnitude of the innovation which by the interpretation adopted by me is wrought on the immediately previously existing law, I am clearly of opinion that the terms of the Act confer on every tenant, be he a khood-kasht or py-kasht ryot, in every estate in the country, who had held at the time of the passing of the Act, or might at any time, partly before and partly after the enactment of the law, occupy for 12 years, a right of occupancy, whether he had that right before or not. The inexact terms of the law might, if considered alone, leave a doubt on the subject. But when the terms of the Section are considered in connection with the repeal of the old laws regarding the rights of khood-kasht ryots, except as to proceedings commenced before the Act came into force—with the modification of Act I. of 1845, so far as relates to the enhancement of rent and the ejectment of tenants by an auction-purchaser, a modification which, as the old laws are repealed, would have nothing upon which to act, did the law not intend to affect the *status* of parties from the date on which it was passed and to be in force accordingly—and with the contemporaneous enactment of a new Sale Law, Act XI. of 1859, attended with the total repeal of Act I. of 1845, in which there is a Section (37) with a proviso, which becomes intelligible only on the supposition that Section 6 is current law,—I cannot entertain a doubt that it was the intention of the Legislature, as gathered from the terms of the law, with which alone sitting as a Judge I have to do, that the law in question should affect the *status* of all ryots falling within its terms on and from the date of the passing of the Act.

This being my opinion, and the points referred to the Court not having fallen through, as they would have done had the Court at large thought differently, I have now to consder the meaning of the terms "fair and equitable" under the circumstances of the present case, when applied to ryots with a right of occupancy.

It has been urged by the learned Counsel, Mr. Doyne, that there are three classes of tenants: khood-kasht ryots, holding at an invariable rate from before the Settlement; ryots holding from old dates, but subsequent to the Settlement; and the creatures of Act X.; that the first class may be said to pay a rent regulated by custom; that the second class might be able to show the same, though, as the zemindar might at any time put an end to their tenancy, it is difficult to see how they could show a rent regulated by custom; but that to the third no custom could apply, for previous to the enactment of Act X. they were mere tenants-at-will;

that the Legislature, by Section 6 of Act X, has only given these ryots a right of occupancy, or, in other words, a preference or a refusal curtailing in no way the right of the zemindar as to the rate of rent which he might demand; that the zemindar, being absolute owner, is entitled to a full rent, a rent proper under the system of competition, that is, the portion of the value of the whole produce which remains after the deduction of the ryot's costs of production—in other words, to rent calculated on the principle of Ishur Ghose's case; that the rates of rent by the system of proportion in the case of a rise in the price of the produce can only be adopted with any show of justice in a case in which it appears clearly that the rate existing up to the present time is based on a certain proportion of the ryot's produce; that, although it is alleged that the Pergunnah rates were so calculated, there is no proof of the fact; that, even were the mode of calculation just, it would at present be impossible of application, for one could not find the value of the ryot's produce at the time of the last adjustment of the rent; that the zemindars have hitherto always entered into engagements with their tenants on calculations based on the theory of rent laid down by political economists; and that this right should be continued, and the principle laid down in Ishur Ghose's case confirmed.

It appears, as I have observed above, that, under the old Regulations of Government, all resident khood-kasht and permanent ryots had enjoyed a right of occupancy, and were entitled, unless they had waived their right by entering into a specific contract inconsistent with it, to enjoy the same so long as they paid their rent, either according to the Pergunnah rate, or to the rate which such lands paid in places adjacent, or the rate fixed by the law and usage of the country; and their tenures could not, by Clause 5, Section 18 of Regulation VIII. of 1819 (a Section of law repealed by Act X. of 1859, and re-enacted in a more complete form in Section 78 of this Act), be cancelled, except after a summary suit obtained at the end of the year, and on failure on the part of the tenant to pay the amount immediately after the decree had been obtained. The right of occupancy which the khood-kasht permanent tenant formerly enjoyed has been granted by Clause 6 to all tenants occupying their lands for the space of 12 years, whether under pottah or otherwise; and they are entitled to receive pottahs at *fair and equitable* rates. Now, I cannot agree with the learned Counsel in thinking that the Legislature intended merely to give to those tenants a preferential right to hold the land being then subject to be rack-rented by the zemindars. I agree with the Select Committee that sat on Act X. of 1859, which remarked that the recognition of a right of occupancy in the ryot implies necessarily some limit to the discretion of the landholder in adjusting the rent of the person possessing such a right; and I think that the terms "fair and equitable" are used with reference to that limit, or, in other words, to the right which tenants with a right of occupancy had under the old Regulations, and that therefore they are the equivalent of Pergunnah rates, rates which similar lands bear in places adjacent, or rates fixed by the law and usage of the country, and are to be explained and interpreted by these customary rates; in short, it appears to me that it was the intention of the Legislature to place the ryot whose rights were created by Act X. in exactly the same position as all other tenants with a right of occupancy held under the old Regulations—and this notwithstanding that recent legislation had curtailed the rights which he enjoyed under those old laws. And here I would notice the error which seems to me to pervade the reasoning of the learned Counsel, *viz.*, that of considering that the principle of competition has ever in this country, to any appreciable extent, determined the mode in which the gross produce shall be divided between the zemindar and the ryot.

"It is only," observes Mr. Mill, "through the principle of competition that Political Economy has

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any pretension to the character of a science. So far as rents, profits, wages, prices, are determined by competition, laws may be assigned for them. Assume competition to be the exclusive regulator, and principles of broad generality and scientific precision may be laid down according to which they will be regulated, But it would be a great misconception of the actual course of affairs to suppose that competition exercised, in fact, this unlimited sway. Competition, in fact, has only become in any degree the governing principle of contract at a comparatively modern period. The farther we look back into history, the more we see all transactions and engagements under the influence of fixed custom. The reason is evident. Custom is the powerful protector of the weak against the strong, their sole protector where there are no laws of Government adequate to the purpose, though the law of the strongest decides. It is not the intention, or, in general, the practice of the strongest to strain the law to the utmost; and every relaxation of it has a tendency to become a custom, and every custom to become a right. Rights thus originating, and not competition in any shape, determine in a rude state of society the share of the produce enjoyed by those who produce it. The relation, more especially between the landholder and the cultivator, and the payment made by the latter to the former, are, in all states of society but the most modern, determined by the usage of the country. Never until late times has the condition of the occupancy of land been, as a general rule, an affair of competition. The occupier for the time has very commonly been considered to have a right to retain his holding whilst he fulfils the customary requirements, and has thus become in a certain sense a co-proprietor in the soil." Mr. Mill goes on to give India as an example of his remark, observing, at the same time, that "the customary rents have become obscure, and that usurpation, tyranny, and foreign conquest have to a great degree obliterated the evidence of them; and he adds "that the British Government of India always simplifies the tenure of a ryot by consolidating the various assessments (that is, the real rent and the taxes subsequently imposed) into one, thus making the rent, nominally as well as really, an arbitrary thing, or at least a matter of specific agreement; but it scrupulously respects the right of the ryot to the land, though until the reform of the present generation (reform even now only partially carried into effect) it seldom left him much more than a bare subsistence." These remarks seem to me admirably to describe the state of things which has existed in this country, to show that any reasoning drawn from facts peculiar to England must be fallacious, and also to confirm the view which I have taken of looking upon Section 6, Act X. of 1859, as a further reform, to adopt Mr. Mill's language, made by the present generation in the interest of the ryot, and a partial return to the old state of things, entitling ryots with right of occupancy acquired under the law by a 12 years' occupancy to obtain pottahs at a rent fair and equitable according to the custom of the country, and not according to the theory of English Political Economists, by whose analysis, when applied to this country, all that is not comprehended in the wages of his labor, and profit of the ryot's stock, must be the landholder's rent.

As, then, the terms "fair and equitable" seem to me to have relation to the customary rate of the country representing a share of the gross produce calculated in money under whatever form of expression it be designated, and as the law directs that in case of disputes the rate of rent which a ryot with a right of occupancy has paid shall be considered fair and equitable until the contrary be shown, it is a fair presumption that the rent now paid represents the customary rent in the absence of any proof to the contrary. Under this presumption, then, when the value of the produce has increased otherwise than by the agency or the expense of the ryot or the zemindar, and simply in consequence of the rise of prices, what is the principle on which the rent should be adjusted?

As the rent now paid represents the customary rent, it represents, on the view which I have adopted, that proportion of the gross produce calculated in money to which the zemindar was entitled; and as the increase in the produce has arisen from circumstances independent both of the zemindar and the ryot, the zemindar is entitled to a rise in his rent proportionate to the increased value of his share of the produce. The formula, then, by which this increase should be determined seems to me to be the following. The value of the gross produce before the alleged alteration in the same is to the rent which the land then bore, as the altered value of the produce is to the rent which should be assessed on it, or, in another form, the old rent must bear to the new rent the same proportion as the former value of the produce of the soil bears to its present value. This method of calculation on the supposition that the costs of production have risen in the same ratio, leave the parties as to each other in exactly the same relative position as they were. The value of the produce which each would receive, the one as rent, the other as ryot's profits, or as representing his beneficial interest, would remain in the same proportion to each other, though the figures representing that proportion will be altered; but even if the costs of production have not increased in the same ratio, that is a point which, under a system in which custom gives to a zemindar only a fixed portion of the produce, is immaterial, or rather one which will not entitle the zemindar by his own act to alter that customary proportion. All the risk of reasons and markets is (as was observed by Baboo Dwarkanath Mitter) with the tenant. But this is not the main reason which entitles the tenant to retain the supposed advantage. It is the system itself which, having once fixed the proportion for which the ryot is liable to the zemindar, refuses to look at costs of production or matters of detail, being content with seeing that the payment of the fixed share of the produce belonging to the zemindar, or that the altered value of that share in money, is ensured to him. Not so, however, under the system in which competition determines the division of the produce. According to this, all that does not legitimately fall within wages and profit is rent, and the competition which has the tendency to reduce profit has the same tendency to raise landlords' rents; but as I have given my opinion that that system does not ordinarily obtain in India, it is unnecessary to carry the subject farther.

An objection was made to the method of proportion on the ground that it was not universally applicable, and that this defect showed that the method is unsound in itself. But such is not the case; for whether, the productive power remaining the same, the value of the produce has increased, or whether the productive power has alone increased, or whether the land be proved by measurement to be greater than the quantity for which the rent has been previously paid, provided the whole land be of one and the same quality, in all these cases coming under Section 17 of Act X. of 1859, the method of proportion is applicable; and the objection, therefore, now under notice need not delay the Court longer. But it was observed by the learned Counsel that, granting that the system of proportion was the correct system to be adopted in a case like that before the Court, great and insuperable difficulties would arise in its application; that it would be impossible to find the value of the produce, net or gross, at the time of the last adjustment which may have been at a remote period; and that by a failure to settle the two first terms of the proportion, the whole calculation would break down But I dot not see any necessity for these supposed difficulties. A zemindar, on suing to enhance, must state the grounds on which he desires the enhancement. If his claim be founded on the increase in the value of the produce through a simple rise of price, he will, whatever the mode of adjustment determined on, have to state the circumstances leading to the demand, and he will have to inform the Court of the particular rise in price subsequent to the last adjustment which justifies that demand. In stating

this, he will give the Court sufficient data for the formula above laid down. It is unnecessary to refer to the period of the last adjustment itself. The price of the produce, previous to the date of the alleged rise in value, will be sufficient data on which to base the formula of proportion; and, when that is obtained, and the rent also, the two first terms of the formula are at hand, and no difficulty need be experienced.

But these remarks apply to cases in which there is no evidence to rebut the presumption that the rate hitherto paid, which, in case of dispute, by the direction of the Legislature, is to be considered fair and equitable until the contrary be shown, is the customary rate. There may, and probably will, as was remarked by Mr. Doyne, be many cases in which parties will be sued for the enhancement of their rents, who were mere tenants-at-will, and who hold under written engagements in which their rents are based upon data inconsistent with the presumption of the rate being a customary rate, and thereby rebutting that presumption, but who by the operation of Section 6 became vested with the right of occupancy. In these cases, of course, the method of proportion will not be applicable. The rents will be adjusted upon the same principle as they were under the old contract, to which the ryots voluntarily submitted themselves.

It was also urged that there were cases in which the old rents had, according to the written terms of the pottah and kubooleut, been settled at rates below the ordinary one, in consideration of certain acts to be done by the tenants which are no longer required to be done; that in this case the rate in the old engagement could not be presumed to be the customary rate; but that, before the method of proportion could be applied to these cases, the old rents must be adjusted so as to equal the rate which was ordinarily borne by similar lands in the places adjacent when such rate was uninfluenced by any extraneous circumstances. This contention is undoubtedly sound; and whenever it is shown from the contract itself that such extraneous circumstances have affected the terms of it, they must be eliminated, and a calculation made irrespective of those must be substituted in their place before the method of proportion can fairly be applied.

In answer, then, to the questions which have been put to the Court by the Division Bench, I would reply that the terms "fair and equitable," when applied to tenants with a right of occupancy, are to be construed as equivalent to the varying expressions, Pergunnah rates, rates paid for similar lands in the adjacent places, and rates fixed by the law and usage of the country—all which expressions indicate that portion of the gross produce calculated in money to which the zemindar is entitled under the custom of the country; that, as the Legislature directs that, in cases of dispute, the existing rent shall be considered fair and equitable until the contrary be shown, that rent is to be presumed, in all cases in which the presumption is not by the nature and express terms of the written contract rebutted, to be the customary rate included in the terms, Pergunnah rates, rates payable for similar lands in the places adjacent, and rates fixed by the law of the country; that in all cases in which the above presumption arises, and in which an adjustment of rent is requisite in consequence of a rise in the value of the produce caused simply by a rise of price and by causes independent both of the zemindar and ryot, the method of proportion should be adopted in such adjustments—in other words, the old rent should bear to the existing rent the same proportion as the former value of the produce of the soil, calculated on an average of three or five years next before the date of the alleged rise in value, bears to its present value; that in all cases in which the above presumption is rebutted by the nature and express terms of the old written contract, the re-adjustment should be formed on exactly the same principle as that on which the original written contract which is sought to be superseded was based; and that in cases in which it appears, from the express terms of the previous contract not still in force, that the rents then made payable by the tenant were below the ordi-

nary rate paid for similar land in the places adjacent, in consequence of a covenant entered into by the ryot to cultivate indigo or other crops, the old rent must be corrected so as to represent the ordinary rate current at the period of the contract, before it can be admitted to form a term in the calculation to be made according to the method of proportion above laid down.

Justices Loch, Bayley, Jackson, and *Glover.*—We concur in the judgment delivered by Mr. Justice Trevor.

Mr. Justice Macpherson.—This case has been argued before the Full Court of fifteen Judges, in order that the opinion of the Court may be obtained on the following questions arising on the construction of Act X. of 1859, *viz.*—

1st.—When there has been increase in the value of the produce, and *the zemindar is entitled to a new kubooleut* from an occupancy-ryot for an enhanced rent at fair and equitable rates, is the fair and equitable rate to be awarded, the rate which might be obtained by commercial competition in the market, or is it a rate to be determined by the custom of the neighbourhood in regard to the same class of ryots?

2nd.—If the customary rate of the neighbourhood has not been adjusted with reference to the increased value of produce, then on what principle is the enhancement of that customary rate to be adjusted?

The question in fact is—a ryot having a right of occupancy being entitled to a pottah "at fair and equitable rates," what meaning is to be attached to these words, and how is it to be ascertained what rates are fair and equitable? Act X. of 1859 is silent upon the point: and it is for the Court now to determine what rates are to be deemed fair and equitable.

It appears to me that, in order to arrive at a just conclusion in the matter, it is necessary to consider, not merely the provisions of Act X., but also the position of ryots who had a right of occupancy prior to the passing of that Act. For, if we shall find from the prior legislation, and from the earlier history of the country, that there was any known rule by which the rates to be paid by ryots who had a right of occupancy were ascertainable, that rule will form a legitimate and safe guide to the ascertainment of the rule which ought now to prevail. Act X. was not intended to be generally subversive of the old law. It was an Act mainly for the protection and benefit of the ryot—an Act "to re-enact with certain modifications the provisions of the existing law relative to the rights of ryots with respect to the delivery of pottahs and occupancy of land, to the prevention of illegal exaction and extortion in connection with the demands of rent, and to other questions connected with the same," besides extending the jurisdiction of the Collectors, and providing for the easier recovery of arrears of rent. So that, where a question is left undecided by the express terms of the new law, we may well look to the former law to assist us in its solution.

I shall not enter upon the general history of the country prior to the Permanent Settlement. That history is referred to at some length in the judgment of Mr. Justice Trevor, and I shall only remark that it very strongly confirms the view which I take of the state of things prior to 1793, and which, I think, is shown by the Regulations of that year to have previously existed. As regards the legislation from 1793 down to Act X., it, in my opinion, shows clearly that the zemindar never was, and never was intended to be, the absolute proprietor of the soil. He never was proprietor in the English sense of the term, or in the sense that he could do with it as he pleased; for certain classes of ryots have at all times had rights quite inconsistent with absolute ownership having rights which entitled them to remain in occupation so long as they paid their rents.

We learn from the Regulations that, prior to the Permanent Settlement, the rents had been from time to time settled and adjusted with reference to the produce of the land, so much of the produce of each beegah going to Government, and so much to the ryot. Whether in the name of rents or in the name of *Abwabs* and irregular imposts, the rents were from

time to time adjusted, and there was a Pergunnah rate or customary rate of the neighbourhood to refer to in case of dispute. In Section 1 of Regulation II. of 1793, it is recited that the amount of revenue payable formerly was liable to frequent variation, that estimates were formed by public officers of the aggregate rent payable by the ryots, and of that aggregate rent ten-elevenths went to the Government and one-eleventh to the landholder. So the preamble of Regulation XIX. of 1793 recites that, "by the ancient law of the country, the ruling power is entitled to a certain proportion of the produce of every beegah of land (demandable in money or in kind according to local custom), unless it transfer its rights thereto for a term or in perpetuity, or limit the public demand upon the whole of the lands belonging to an individual, leaving it to him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public while he continues to discharge the latter."

Regulation I. of 1793 makes the Decennial Settlement perpetual, and declares (Section 4) to the zemindars and other actual proprietors of lands "that they and their heirs and lawful successors will be allowed to hold their estates at such assessment for ever." In Section 7 it is said that the Governor-General in Council trusts that the proprietors of lands "will exert themselves *in the cultivation of their lands*, under the certainty that they will enjoy exclusively the fruits of their own good management and industry." It is to be observed that it is to the *cultivation of lands* that the attention of the zemindars is directed—it being open to them, as appears from other Regulations which came into force simultaneously, to make such arrangements as they pleased with new ryots as regards new lands not previously cultivated. Even on the face of Regulation I. of 1793, however, the zemindar was not absolute proprietor: for it is expressly stated in it that "to conduct themselves with good faith and moderation towards their dependent talookdars and ryots" is among the duties of proprietors of land—and Section 8 reserves power to the Governor-General in Council to enact such Regulations "as he may think necessary for the protection and welfare of the dependent talookdars and other cultivators of the soil."

By Regulation VIII. of 1793, Section 51, provision is made to prevent undue exactions from dependent talookdars and the rules under which the amount payable by them may be enhanced are laid down. It is declared that they may be increased "by special custom of the district," or "by the conditions under which the talookdar holds his tenure." Section 52 enacts that the proprietor may "let the remaining lands of his estate under the prescribed restrictions, in whatsoever manner he may think proper." By Sections 54 and 55 all *abwabs* and other irregular imposts on the ryots are directed to be consolidated with the rent, and it is forbidden to create any new Abwabs or imposts of any kind. Section 56 says: "It is expected that in time the proprietors of land, &c., and the ryots, will find it for their mutual advantage to enter into agreements in every instance for a specific sum for a certain quantity of land." *Where it is the custom to vary the pottah* for lands according to the articles produced thereon, and the parties shall prefer to adhere to the custom, the engagement between them is to specify the kind of produce, the quantity of lands, amount and rate of rent, and term of lease, with other particulars. Section 57 enacts that "the rents to be paid by the ryots, *by whatsoever rule or custom they may be regulated*, shall be specifically stated in the pottah." Section 59 empowers the ryot to demand a pottah from the person from whom he holds. Section 60 declares that the pottahs of *Khood-kasht ryots are not to be cancelled*, except it be proved that "the rents paid by them within the last three years have been reduced below the *nirikbundy of the Pergunnah*." And Section 62 provides for the appointment of putwarries—one object of their appointment being *to prevent oppression of the persons paying rent*.

It will be seen that this Regulation teems with provisions quite incompatible with any notion of the zemindar being absolute proprietor. It will also be observed that the custom of the District and the Pergunnah rate are referred to as furnishing the rule for fixing the rent to be paid by those having the right of occupancy.

Regulation XIV. of 1793, after expressing a fear, lest foolish or vicious proprietors should grant pottahs at a reduced rent for a long term or in perpetuity, and so endanger the Government revenue, goes on to say that at the same time it is essential that the proprietors of land should have a discretionary power to grant leases and fix the rents of their lands for a term sufficient to induce ryots to extend and improve the cultivation, &c. Section 2 enacts that such pottahs shall not be granted for a period exceeding 10 years; and Section 5 provides that sales for arrears of revenue shall cancel all pottahs to ryots and engagements with dependent talookdars (save as therein excepted), and that the purchaser may demand from the ryots, &c., *whatever the former proprietor would have been entitled to according to the established usage and rate of the Pergunnah or District, had the cancelled engagement or lease never expired.*

I next come to Regulation IV. of 1794, which in its preamble recites that it is essential for the protection of ryots to adopt rules to determine disputes between them and proprietors "regarding the rates of the pottahs required to be granted by the Regulation VIII. of 1793, or the rates at which pottahs that may expire or become cancelled under Regulation XLIV. of 1793 are to be renewed." Section 6 provides that disputes regarding the rates at which pottahs under Regulation VIII. are to be granted are to be decided by the Civil Courts *according to the rate established in the Pergunnah for lands of the same description and quality;* and Section 7 enacts that ryots whose pottahs have expired or been cancelled under Regulation XLIV. of 1793 are not bound to take new pottahs *"at higher rates than the established rates of the Pergunnah for lands of the same quality and description."* They are entitled to renewed pottahs at the established rates as under Regulation VIII. of 1793.

Regulation IV. of 1808 has also been referred to in argument. It applies only to Benares. It relates to the appointment of Canoongoes, whose duties (amongst other things) were by Section 6, Clause 5, to compile information regarding Pergunnahs "articles of produce, rates of rent, rules and customs established in each Pergunnah."

Another Benares Law referred to was Regulation LI. of 1795, of which Sections 9 and 10 are somewhat similar to Sections 6 and 7 of Regulation IV. of 1794, which I have already mentioned. The conclusion of Section 10 enacts that khood-kashts will be entitled to have their pottahs renewed *at the established rates,* as are also py-kasht ryots, "provided the proprietor chooses to permit them to continue to cultivate the land which they have the option to do or not as they may think proper on the expiration of all py-kasht leases; whereas khood-kasht ryots cannot be dispossesed as long as they continue to pay the stipulated rent."

Regulation VII. of 1799, Section 29, Clause 5, enacts that any under-tenant whose lease is cancelled by Section 5 of Regulation XLIV. of 1793 may be ejected if he will not renew as provided by the Regulations to which I have already referred.

The next Regulation which has been quoted is Regulation V. of 1812. Section 2 removes the restriction which prevented zemindars from granting leases for more than 10 years. Section 5 says: "There being reason to believe that the Pergunnah rates are in many instances become very uncertain, the following rules shall be approved on all occasions of that nature" (*i. e.*, cases in which leases are cancelled by sales for arrears under Regulation XLIV., 1793, Section 5, &c.). Section 6 enacts that, "if any known established Pergunnah rates exist," they are to be the test of the rates at which new pottahs are to be given; and Section 7, that if no established rates of the Pergunnah or local division of the

country be known, pottahs are to be granted, &c., according to the rates payable for land of a similar description in the places adjacent; but if the pottahs of the tenants of an estate generally, which may consist of an entire village or other local division, be liable to be cancelled under the above rules, new pottahs shall be granted at rates *not exceeding the highest rates paid for the same land in any one year within the period of the three last years antecedent to the period at which the leases may be cancelled.*

Regulation VIII. of 1819, while providing for the sale of talooks, &c., for arrears of revenue free from encumbrances. and free from all leases granted by the defaulting proprietor, provides nevertheless (by Section 11, Clause 3) that the purchaser shall not be entitled to eject "a khood-kasht ryot or resident and hereditary cultivator."

So in Regulation XI. of 1822 (which also relates to the sale of lands for arrears of revenue), Section 32, it is enacted—"nor shall the said rule be construed to authorize any purchaser to eject a *khood-kasht kudeemee ryot or resident and hereditary cultivator having a prescriptive right of occupancy.*"

Again, by Act XII. of 1841, Section 27, purchasers of estates sold for arrears may, &c., "enhance at discretion the rents of all under-tenures in the said estate, and eject all tenants thereof," except (1) istemrarees or mokurerees at a fixed rate 12 years before the Permanent Settlement: (2) tenures existing at the Permanent Settlement, and not proved liable to assessment, &c.: (3) "lands held by khood-khast or kudeemee ryots having rights of occupancy at fixed rents, or at rents assessable according to fixed rules under the Regulations in force." (4) &c.

This provision was re-enacted in Act I. of 1845, Section 26.

These are the Regulations and Acts prior to Act X. which bear upon the subject. Having set forth in detail those portions of them which I think most material, it will be sufficient for me briefly to state the conclusions which I draw from them.

It appears to me, then, from these various enactments, and independently altogether of any history save such as they themselves relate, that zemindars never, at any time, were the absolute proprietors of their estates; but that they at all times have held subject to the rights of various classes of ryots whom the zemindar had no power to eject, so long as the proper rents were paid by them. The rent payable by some of those ryots was fixed and unalterable. The rent payable by others was subject to increase under certain conditions. Rents prior to the settlement were fixed according to the produce of the land, so much of each beegah going to the Government as landlord, and so much to the ryot. The same principle prevailed after the Settlement, save that the position of the zemindar, as land-holder between the Government and the actual cultivator, was distinctly recognized, and he was declared to be the proprietor of the land in a certain restricted sense. The rents were from time to time adjusted, and there was a Pergunnah rate or customary rate of the neighbourhood (based on the original rule as to dividing the produce proportionately, and from time to time re-adjusted) to refer to in case of dispute, and according to these rates disputes were settled. Ryots who had a right of occupancy, but who were liable to have their rents increased, could not be enhanced above the Pergunnah or customary rates. As regards new lands and persons not having a right of occupancy, the zemindars could make what arrangements they pleased. It is unnecessary here to decide to what precise extent such ryots, coming in under special engagements, did or could acquire a right of occupancy. For the purposes of the question before me, I consider it enough to look only at the position of such ryots as had an admitted right of occupancy, but were liable to have their rents enhanced according to certain rules. It further appears from the Regulations that the adjustment of the Pergunnah rates was much neglected—probably owing to no great change having for many years taken place in the amount or value of produce—and that there were no recently adjusted rates to refer to, and no customary rates to form any general guide throughout the country.

In this state of things Act X. was passed. It provides that persons having a right of occupancy shall be entitled to hold "at fair and equitable rates." It appears to me that, in the absence of any rule or guide contained in the Act itself, we may well, in considering what is fair and equitable, look at what was deemed to be "fair and equitable" in the case of persons having a right of occupancy prior to Act X. Under the old law persons having a right of occupancy were not liable to have their rents increased, save according to the Pergunnah rate or customary rate of the district. Finding that this rule has prevailed ever since the Decennial Settlement, and prior to it, I may well presume that the rates so ascertained are fair and equitable." In my opinion where there has been any recent adjustment of the Pergunnah rates, they should certainly be now followed. In the absence of any customary rates of the neighbourhood or Pergunnah rates so recently adjusted as to form any distinct guide, I think that the rule of proportion, on which the Pergunnah rates or custom of the district were undoubtedly originally based, is, in the present defective state of the law, the best rule to be adopted, subject to certain qualifications.

It has been contended that "rent proper" or "rack-rent"—such a rent as would be obtained by putting the land up to competition—is the only "fair and equitable" rent. But it appears to me that no such rent can possibly be fair or equitable, were it only for this simple reason that, in assessing the rent on that principle, nothing is allowed to the ryot for his right of occupancy. If he is to be rated on that principle, his right of occupancy must be ignored wholly, and he must stand precisely as he would have stood had he had no such right. The right, if it exists, must needs be worth *something*. Yet in none of the calculations made or suggested to the Court, on the footing of "rent proper" or "rack-rent" or competition, has anything been allowed him on this account: nor indeed could it be. That the Legislature intended the right of occupancy to be a valuable right, I do not doubt from the terms of Act X. How it is to benefit the ryot in any material degree, so long as it is merely to give him a preferential claim if no higher bidder comes forward, I am at a loss to see.

In my opinion the rule of proportion—as the old value of produce is to the old rent, so is the present value of produce to the rent which ought now to be paid—is the rule which should be adopted in the absence of any recently adjusted Pergunnah customary rates. In so ascertaining the rate, we shall be ascertaining it on a principle similar to that on which the old Pergunnah or customary rates were fixed. We shall be doing what was deemed fair and equitable in the case of ryots having a right of occupancy prior to Act X., and what is not less fair and equitable in the case of ryots having a right of occupancy under that Act. Let the zemindar seeking to enhance the rent go back to any year he chooses; let him go back to the last adjustment if he can—if not, to any year which he thinks will suit his purpose—and let him prove that the proportion was then more favorable to him than it has subsequently become. Either party should be at liberty, in each case, to prove any special circumstances tending to show that the application of the rule of proportion to that particular case would work injustice.

On the whole, the answer which I would give to the questions put is in substance the same as that proposed by Mr. Justice Trevor—in whose opinion as to Act X. of 1859 not being merely prospective in its operation, as indeed in the greater part of his judgment, I entirely concur.

Mr. Justice Phear.—This was a suit brought to obtain a kubooleut for three years at an annual jumma of Rs. 95-7-8 at the rate of Rs. 4 per beegah of land in the defendant's possession.

The plaintiff was auction-purchaser of the talook in which the land in question lay, and he alleged in his plaint that the defendant paid rent for the land at a variable rate; that the productive powers of the said land and the value thereof had without any exertion or agency of the plaintiffs increased at the time of filing the

plaint; and that the lands adjacent to the subject of suit were rented at the rate sued for.

The defendant, amongst other things, denied these allegations.

The Court of first instance decreed the kubooleut at the rate sued for; and, on appeal to the Judge, he dismissed the appeal with costs.

The Lower Appeal Court gave judgment in the following words :—

"The plaintiff sues to obtain a kuboo-"leut at enhanced rates. The defendant "alleges a fixed rent from the time of "the Permanent Settlement. The Lower "Court finds, on the admission of the "defendant in another suit, that she pays "to the 9 annas shareholder a different "rate than she admits now, and conse-"quently holds that the rent of the te-"nure has varied as regards one portion, "and therefore as regards the whole, and "gives a decree at the rate of Rs. 4 per "beegah of 80 haths, which appears to "it equitable on the evidence.

"The defendant appeals both as to the "alleged fixed tenure and also as to the "rate. But it seems that there is no "proof on the record of a fixed rent "having been paid for twenty years to "the plaintiff, and therefore this ground "of appeal is relinquished. As respects "the rate, I find that the witnesses on the "part of the plaintiff state specifically "that the rates of which they speak refer "to a beegah of 80 haths, and that the "judgment of the Lower Court also "refers to a beegah of that size. No "evidence was brought by the defendant "to rebut this evidence, and it is not "even argued here that the rate is wrong "on a beegah of that size, but that the "current beegah in that Pergunnah is "95 haths: but the size of the beegah is "immaterial in calculating the rate.

"The judgment must be confirmed at "the rate of Rs. 4 per beegah of 80 haths. "If the defendant desire it in the exe-"cution of this decree, the land in her "occupancy will be measured, and the "rent calculated accordingly.

"The appeal is dismissed with costs."

From this judgment the defendant specially appealed to this Court, and the appeal first came on to be heard before Campbell and E. Jackson, JJ. On behalf of the defendant, it was then urged—

1st.—That the Lower Appellate Court was in error in saying that there was no evidence to make out the defendant's right to the presumption of fixity of rent.

2nd.—That there is no proper finding of the Lower Appellate Court on the question of increased value.

3rd.—That the decision of the Court of first instance confirmed by the Lower Appellate Court in respect to the rate of increase to be paid by the ryot is based on no principle whatever.

Campbell and E. Jackson, JJ., dismissed the special appeal so far as it depended upon the first of the above grounds. But they upheld the second ground of objection, and decided that the case must consequently be remanded. And they further considered that there was such a conflict in the decisions of the several division benches of the High Court relative to the principle to be followed in assessing the rent to be paid by the ryot in cases of this kind, as to render it highly desirable to have the opinion of the full Court upon the point before sending the case back to the Lower Court for its re-consideration Under these circumstances, they referred the case to the full Court of 15 Judges for the determination of the two following questions :—

1st.—When there has been increase in the value of the produce, and the zemindar is entitled to a new kubooleut from an occupancy ryot for an enhanced rent, at fair and equitable rates, is the fair and equitable rate to be awarded, the rate which might be obtained by commercial competition in the market, or is it a rate to be determined by the custom of the neighbourhood in regard to the same class of ryots?

2nd.—If the customary rate of the neighbourhood has not been adjusted with reference to the increased value of produce, then on what principle is the enhancement of that customary rate to be adjusted?

The case has been argued before us at great length as befits its undoubted import-

ance, and we have had the advantage of all the reasoning and illustration which the very able advocates of each side have brought to our notice. The answers to the questions seem to hinge on the interpretation to be given to the words "fair and equitable" as used in Section 5 of Act X. of 1859. And, although the questions themselves are fairly specific, still they are, to say the least, but little comprehensive; and the way in which this case has come before us, and has been treated by both sides in the discussion, obliges us to go beyond their limits and to attempt to enunciate the meaning of the words in question in the form of a general rule. We are thus prevented from confining ourselves to our legitimate function, namely, that of saying what is the effect of those words merely on the particular issue placed before us. I need hardly remark that the constitution and procedure of a Court of Justice is very ill-adapted to carry even that which is often termed judicial legislation beyond the facts of the case material to the issue which is before the Court for decision. The Superior Courts of England have uniformly refused to countenance any attempt made to induce them to transgress this limit. It seems to me, however, that we are now asked, and in some sense compelled, to take a very large step into the region of pure legislation. It is foreign to our ways of proceedings and of deliberation to undertake the framing of a declaration of law which shall be prospective, and have application to eventual and unascertained conditions of fact; and I can scarcely hope that the effort to do this, which we are about to make, can end in a result which shall be satisfactory.

A preliminary objection has been raised (for the first time in this Court) that Act X. does not apply to the case at all, inasmuch as it is said the defendant has no right of occupancy unless by virtue of Section 6 of that Act; and it is contended that the qualification of twelve years mentioned in that Section cannot be taken to embrace time, any portion of which had expired before the Act came into force. I think this objection must be overruled.

It has been supported by argument which certainly seemed to me to exhibit some disregard of the distinction between "retrospective action" and present interference with vested rights; but fortunately it is not now necessary to go into the merits of this discussion, because it is, I believe, the unanimous opinion of the Court that the words of the Section are so strongly explicit as to leave no sort of ambiguity as to their meaning, and it is only in cases of ambiguity that recourse can be had to *à priori* presumption as an aid to construction. I conceive that the Section in effect says: "Every "ryot, who, at the date when the Act "comes into operation, has been, or at "any date thereafter shall have been, in "continuous occupation of land for the "period of the preceding twelve years, "whether that period comprises time "which elapsed before the date of the "Act coming into operation or not, has, "from the time of the completion of "the twelve years, a right of occupancy "of the land."

This being so, the suit is rightly brought under the Act, and it becomes necessary to see what the general scope of the Act is, so far as it concerns the settling questions of rent between landlord and tenant, in order to ascertain whether any guide is afforded by it to the "fairness and equity" of Section 5. The result in my mind of the best consideration I can give the matter, aided by the very full discussion which has taken place, is that these words are not directly referable to, or dependent upon, the provisions of section 17. I think the legislative effect of the Act upon the subject before us may be fairly summed up and arranged in the following manner:—

All ryots are entitled to receive pottahs (Sec. 2) and—

(I.) Ryots having rights of occupancy (*a*), who hold lands at rates which either have not been changed, or must by law be presumed to have not been changed, since the time of the Permanent Settlement, are entitled to receive their pottahs at those *fixed rates* (Secs. 3 & 4).

(*b*). Who do not hold land at any such invariable rates are entitled to receive

their pottahs at *fair and equitable* rates (Sec. 5).

(II.) Ryots not having rights of occupancy are entitled to pottahs only at such rates as may be *agreed on* between them and the persons to whom the rent is payable (Sec. 8).

On the other hand, every person who grants a pottah, or *tenders* one, such as the ryot is *entitled to receive*, is entitled to receive a kubooleut (Sec. 9).

Provision is made for enabling the parties to enforce this right to a pottah and kubooleut respectively by the agency of a suit before the Collector; and in my judgment these rights are correlative. In the suit for the kubooleut, the main question must always be whether the corresponding pottah is such as the ryot is entitled to receive; and as it has been judicially decided that the commencing the suit is sufficient evidence of the tender of the pottah, the issue between the parties comes to be the same whether proceedings are first instituted by the ryot or by the zemindar.

It is said that, although a pottah for a term of years may be sued for by the ryot at any time, yet the most that the landlord on his side can do is to sue for a kubooleut of an indefinite pottah which shall fix the rent for one year or until the ryot objects; and in support of this contention, the difference in the wording of Sections 80 and 81 is referred to; also Section 76 is relied upon as showing by implication that the Legislature only gave the Collector power to fix the term in the case of a ryot's suit. But if this be so, what authority has the Collector in a suit for a kubooleut to fix the rent for a year even, or from year to year, until the ryot objects? As I have already said, I think the Act makes the landlord's right to a kubooleut correlative to, and co-extensive with, the ryot's right to a pottah, and I do not myself see sufficient in the difference of phraseology just mentioned to lead to a contrary inference; and I may remark that this right of suit for a kubooleut does not give the zemindar, as might at first seem to be the result, a new right of compelling the tenant to occupy the land for a coming term of years whether he is willing to do so or not, because Section 19 expressly enables the ryot in *all* cases, by giving proper notice, to throw up his holding whenever he likes.

The right to bring a suit of this kind is in fact a right to oblige the other side to submit to the arbitration of the Collector with regard to the terms upon which the holding shall be continued; and I see nothing in the Act to prevent this arbitration being invoked at any time when either party is dissatisfied with the existing relations between himself and the other, or on as many occasions in succession as the dissatisfaction may arise. The agricultural year always, I believe, commences with the month of Bysack, and tenant holdings, whether by contemplation of the Regulations or by custom of the country, never involve fractions of years. Consequently, the Collector's decision would generally, unless by the express consent of the parties, take effect from the beginning of the ensuing year. If, at the time of the application to the Collector, a pottah is subsisting (whether it originated in agreement between the parties or in a suit), comprehending a definite term which will not have expired at the end of the current year, it ought, probably, except in extreme cases of hardship to bar the applicant's claim. In all other cases, I conceive the bringing of the suit is intended by the Legislature to be sufficient notice on the part of the plaintiff to terminate the existing agreement as to rent at the end of the current year.

As to the current year, or the preceding year, supposing time not to have barred the landlord's right to recover in respect of it:—

(A.) If a written pottah *for a term of years* be in force, then the rent is fixed by that.

(B.) If such a pottah, for any reason, be not in force, then the rent is that of the previous year, *unless* the landlord had, in or before the month of Cheyt which preceded the year in question, served on the tenant *notice of enhancement* and the grounds thereof, and the tenant either has not contested his liability, or, contesting it, has failed, in which case the rent is

recoverable on the terms of the notice (Sec. 13).

In the event of the ryot contesting his liability before the Collector, the latter must, I suppose, though I still feel hesitation as to this point, be guided to his judgment by considerations of "fairness and equity," whatever those words may mean as used in the 5th Section; and if the ryot be one having a right of occupancy, those considerations must have exclusive relation to the grounds of enhancement mentioned in Section 17, and also relation to those of abatement in Section 18.

Again, the ryot may at any time formally complain to the Collector that the rent *demanded* of him is too high.

On the whole, then, I conceive the Act intended to give each side two modes of seeking relief against the other, namely—

1st.—That of obliging him to enter into a prospective written agreement.

2nd.—That of adjusting the terms for each year, as the occasion arises.

It may well be that the Legislature, while it desired that every opportunity should be given for the creation, at the instance of either party, of leases for terms of some definite duration, yet felt obliged, by the character and circumstances of the cultivators, and the physical conditions of the country, to leave an opening for annual adjustment by judicial intervention.

The case before us falls under the first head only, and I conceive that we are in effect asked to direct the Court below what circumstances are to be looked at, in judicially fixing the terms of a pottah as regards rent such that it may be *fair and equitable* between the parties within the meaning of Act X. of 1859, the pottah being prospective, and commencing with the ensuing year, and the tenant being a ryot having a right of occupancy.

The Act itself does not anywhere say expressly what the Legislature intended this fairness and equity to have regard to.

I do not consider that Section 17 has any bearing on the point. In my judgment that Section relates solely to what I will venture to term the *de anno in annum* process of Section 13; it is clear that Sections 14, 15, and 16, are necessarily confined to that, and Section 17 appears, as regards its subject-matter, to follow them in natural sequence. The word "enhancement" used in it must, as it seems to me, mean the technical enhancement of Section 13, in which Section the word occurs for the first time in the Act, and can have no relation to any increase on a former rent, which may be the result of fixing a new rent in a suit for a pottah or kubooleut.

In the absence, then, of any legislative instruction on the point, I think we ought to so construe the words "fair and equitable" as to disturb as little as possible the relation which obtained between the parties before, or independently of, the operation of the Act, so far as it can be ascertained. And this relation differs, as I conceive, with each separate case, so that it is impossible for us to lay down a single rule of assessment to be followed in all cases alike. On the one side, it has been contended for the zemindar that he has always possessed the right to exact a rack-rent from the ryot, and that the Court ought not, in fairness and equity, to recognize any principle of assessment which would not strictly lead to such a rent. On the other side, it has been urged with equal force that the ryot has been always entitled to some definite share of the produce of the land, and therefore the Court ought to lay down an inflexible rule of proportion. I do not think that either of these courses would be fair and equitable to the parties. In my judgment, the zemindar's contention cannot be *universally* supported for two reasons—

1st.—Whatever may have been the abstract rights intended to have been conferred upon the zemindars by the Regulations, in practice they have, generally speaking, never been exerted to the extent of producing a rack-rent. This is hardly denied by any one; and the very considerable margin which any calculation of a rack-rent exhibits beyond that which the landlord even ventures to claim in litigation, sufficiently supports this position. If any principle of competition has ever (at any rate for the last 70 years) found play, it

has done so in the face of such local public opinion or custom as has, in the majority of cases, modified its results to an extent that cannot readily be allowed for in calculation.

2nd.—It is impracticable, under the circumstances of these cases, to make *ab extra* an assessment of the true, or even approximately true rack-rent. The various formulas of the political economists for a farming rent are but so many analyses of the result of free competition; at best, they only express the amount of rent in terms of other elements, which are themselves the result of free competition. If the free competition never existed, or, having once existed, has in any manner been put an end to, the element depending upon it cannot be ascertained. The right of occupancy itself seems, then, to be a great stumbling block in the way of working any politico-economical formula, and certainly (independent of anything introduced by the new Act) there has, as it seems to me, been no such open market bearing upon the value to be given to the ryot's skill, the amount of risks run by him, the profits obtainable by the application of his capital to other pursuits (or in other modes), &c., &c., as is capable of producing trustworthy data for getting at what would be the market rent, on the hypothesis of a free competition for the land which does not now exist. And indeed I cannot help thinking that there is a fundamental mistake at the bottom of all the calculations which have been made for this purpose. It has been attempted to estimate the rent payable by the ryot to the zemindar on the footing of its being a proper farming rent, such as is given birth to where there is a limitation of the demand dependent upon the amount of profit to be got by the investment of capital, and no other limitation. But the condition and circumstances of the ryot, as I understand them, are not such as to give rise to a farming rent; his capital, when he has any, is so small, and his hereditary habits of life such, that (speaking of him as a class) he seems generally to have no alternative but to cultivate the land. He cannot carry himself and his capital into other markets, or, at any rate, never to any appreciable extent, thinks of doing so. The profits derivable from his skill, labor, and capital never have affected the rent he pays, nor, economically considered, ought to do so. His tenancy, if of a competitive character at all, is of the nature of a *cottier* tenancy, in which the rent is purely the result of the relation of the numbers who want the land on one side to the supply of land on the other; and the numbers who want the land are in no way determined by the profits obtainable by the investment of capital and skill. No other class than this ryot class is seeking the land, and consequently the rent cannot possibly be got at by any process other than actual competition. And it is worth remarking that the result of this will be that, if the numbers of the ryots wanting land are small, relatively to the quantity of land wanting ryots, the tenant may well get a portion of the profits of the soil, which, under the estimate of a proper farming rent, would go to the landlord.

I can as little agree to the general rule contended for by the ryot as I can to that of the zemindar, because I do not think that the former has at all established any definite claim in *all* cases to a proportionate part of the produce of the land.

A third alternative has had prominence given to it during the discussion of this case, which, as far as I am able to give it expression, seems to be this, namely, that by some sort of natural equity the tenant ought only to get so much of the profits of the land as is attributable to the application of his labor, skill, and capital, and that the landlord as owner of the soil ought to get all the rest. I am convinced that a doctrine so vague as this finds no countenance in any writers on Political Economy, and a little reflection shows that it is practically inapplicable. It is physically impossible to separate the part of the produce which is due to the tenant's exertions from that which is the result of the intrinsic qualities of the land; without land and without cultivator alike, there would be no agricultural produce at all, and it is simply absurd to attempt in any case to distinguish that which is due

to the one cause from that which is due to the other. In fact, the sharing of the produce between landlord and tenant never has been, and never can be, based on any consideration of this kind; and there is nothing inherently inequitable in an arrangement, which may, in the estimation of those accustomed only to farming rents, give the tenant even an apparently extravagant portion of the produce.

With the view I take, it is not at all necessary to discuss the question as to what are the respective rights of khoodkasht and py-kasht ryots. I think every case must turn on its own attendant circumstances.

When the Collector is called upon in any given case to determine the rent which it is fair and equitable that the ryot should pay, he ought to enquire—

1st.—Whether at the last antecedent period, when the arrangement between the parties (either then created or previously existing) was such as must, by reason of tacit acquiescence or otherwise, be taken to have been fair and equitable, that arrangement contained express stipulations as to rent: if so, then these stipulations, unless the reason for them is gone, should be followed in arriving at the rent for the new pottah. Under this head would be ranged all actual rack-rent and cottier rent agreements, whenever any such have been come to: and if the Collector is called upon to act upon an arrangement of this kind, I can give him no alternative to looking at the actual market, because I believe, for the reasons I have already mentioned, that there is no other fair and equitable mode of arriving at competition rents in this country.

2nd.—If the Collector finds no express agreement to guide him, then he must ascertain whether the ryot is legally entitled by custom, based either on his personal *status*, or on the character of the land occupied by him, to any definite share of the produce of the land, or to any beneficial interest in it. If the ryot is so entitled, the rent must be adjusted accordingly.

3rd.—If neither express agreement, nor legal right in the ryot, be found to have determined the amount of rent, the last arrangement must, I conceive, have been governed by some locally prevailing custom, or the rent regulated, tacitly, according to some locally prevailing rates; and in that case I think the custom ought to be complied with, and the rates adhered to. It is obvious from what I have already said that these rates will, by the nature of the case, be almost invariably such as to give to the ryot's holding a beneficial character; and, therefore, I think the fair presumption will be, in the absence of evidence, or unless a different foundation be actually shown, that the rate was originally based upon the principle of sharing the produce of the land between the ryot and zemindar in a fixed ratio. Many of my learned brothers are of opinion that this is not properly a presumption of fact, but is, in truth, a matter of legal right established by history. I confess that I feel great difficulty in seeking and ascertaining law from such a source: and further I am reluctant, while acting judicially, to pledge myself to the acceptance of any particular version of a history which notoriously rests upon most imperfect materials. Under these circumstances, although my conclusion on this point is, I believe, practically in unison with that of the majority of my colleagues, I regret that I cannot place it on the foundation which they have chosen, but am compelled so far to separate from them as to rest it solely on a presumption which I consider to be natural and justifiable, quite independently of any history whatever. The result of applying this presumption would be that the new fair and equitable rent would be the same proportionate part of the new produce that the old rent was of the old produce.

And I further think that, in all cases, the duration of the intended pottah must be taken into consideration as an element affecting the question of fairness and equity.

By proceeding in the manner I have attempted to sketch out, the Collector will, I believe, be enabled to determine what rent would be fair and equitable between the ryot and his landlord within the meaning of the Act. And, I think, under the peculiar circumstances of this case to

which I have already alluded, I cannot usefully put my answers to the questions submitted to us into a less general shape.

Mr. Justice Campbell.—I entirely concur with Mr. Justice Trevor, except in the use of any expression which might seem to imply any doubt whether a ryot possessing a right of occupancy can be, in any shape, subjected to enhancement on any ground other than those mentioned in Section 17, Act X. of 1859. Though this question does not properly arise on the limited reference of the Division Bench, it has been argued that, in such a suit as this, for a kubooleut at an enhanced rate, the zemindar is not restricted to those grounds. I am decidedly of opinion that he is limited to the grounds mentioned in Section 17, in whatever shape he sues or can sue.

The provisions of Section 6, Act X. of 1859, are so entirely declaratory in their terms, and in that sense would seem to define so unambiguously the class of ryots possessing rights of occupancy, while the old Regulations explain so clearly the *status* of occupant ryots, that it might seem at first sight unnecessary to go further back into historical retrospects with a view to determine the character of their rights. But it has been thought necessary to open up this enquiry with a view to show that in fact the occupancy rights of the present day are not of the character which is claimed for those of ancient days, or that we must, at any rate, distinguish between different classes of ryots, whom Act X. of 1859 has included within a too wide definition. It would seem to be assumed that the old ryots and their descendants never had very high rights; that, whatever they were, they have for the most part died out; that the occupancy ryots of Act X. of 1859 are, as a body, the creation of that Act; and that occupancy tenures must be treated as so created for the first time, and the Act construed as if it merely conferred certain limited tenant-rights upon those who before held as tenants-at-will. To test these arguments, some historical survey has become necessary.

I take the same general view as Mr. Justice Trevor with regard to the history and nature of landed tenures in Bengal before the Permanent Settlement. There can be no doubt that the Settlement attributed to Tooran Mull (and alluded to by Mr. Justice Trevor), like all the Settlements of Akbar and his successors, and, indeed, all the detailed settlements of the British Government founded upon the same system, dealt primarily with the individual ryot, and fixed the sum payable by him for the land which he cultivated. The process is described by Elphinstone, pp. 475-6. It appears that the average produce of the beegah of land of each description was ascertained, and the Government share was then calculated, one-third being the full demand, and deduction being made for fallows, occasional inundations and droughts, inferior soils, &c. The average dues of the State (in grain) being thus ascertained, the grain rates were commuted into money on an average of the price currents of the nineteen previous years, and the rates so obtained were calculated on the land of each ryot. The option of paying in kind according to the established proportion seems, however, to have been maintained. Thus the payments of the ryots were fixed by an act of State quite independent of the will of any other subject, or of any question of competition or relation of landlord and tenant in the English sense. Whether the revenue was paid direct to the officers of Government, or by the village communities jointly through their headmen, or through hereditary zemindars of a superior grade, the quota due from each ryot was fixed and recorded; that was the unit of the whole system from which all calculations started. The headmen and zemindars were remunerated for their services, or received the hereditary dues to which prescription entitled them in the shape either of percentages on the collections from the ryots, or of Nankar land held exempt from revenue. That is clearly the old law of the country in general, and of Bengal in particular. Even when, in the decline of Governments, the State control became relaxed, and the ryots became subject to much oppression on the part of those placed

over them, they still had some protection in the only ever-surviving law of the East—'*Custom.*' The old-established rates they have always continued to cling to as sanctioned by '*Custom.*' That custom the worst oppressors could not openly defy; and hence, as shown by Mr. Justice Trevor, all extortions and imposts took the shape of extra cesses, levied on various pretexts. Even when thus, by oppression, the sums levied may have been raised up to or even beyond a rack-rent, the remark of Mr. Mill seems irresistible, that the shape in which they were taken, and the survival beneath all imposts of the old customary rates, is the strongest evidence, that the right of the ryot survives, to become again beneficial in better times.

That these rights survived in this shape in Bengal up to the time of the introduction of British rule, there is the amplest evidence. Every early paper on the subject teems with evidence to show that the ryots were very much more than tenants-at-will, even where legal and illegal exactions had been jmposed to the farthest on the proper or 'Assal' rates.

Indeed, the concurrence of the early Regulations of the British Government in every different part of India, made at different times, under different circumstances, and by different Governments, which, in other respects, differed most widely in their views on kindred subjects, would seem sufficiently to establish that, under the old law and custom of India, as everywhere found on the assumption of territory by the British Government, some right in the soil still belonged to the ryot. However widely they differ in regard to the superior rights of Government and the great landholder, they all concur in the view that neither the Government nor the great landholder had an absolute and complete right, but that some right was concurrently enjoyed by the ryot in the shape of a right of occupancy at rates regulated by custom.

On this general question, I would only further add to what Mr. Justice Trevor has said that with reference to a frequent modern assertion that this alleged right is a mere invention or resuscitation of a benevolent British Government, I have sent for the three greatest and best authorities on the modern Native States in different parts of India—books which were written long before these discussions arose. I take Tod's Rajpootana for the North of India, Malcolm's Central India for the Centre, and Buchanan's Journey in Mysore (then under Native Government) for the South. I turn to the Indices to see what is said of the ryots. I find the following:—

Tod puts their rights very high. He says (Vol. I., page 494): "The ryot (cultivator) is the proprietor of the soil in Mewar. He compares his right to the 'a'khye d'hooba.'"* He calls the land his Bapota, the most emphatic, the most ancient, the most cherished, and the most significant phrase his language commands for 'patrimonial inheritance.' He has Nature and Menu in support of his claim, and can quote the text alike compulsory on prince and peasant—"Cultivated land is the property of him who cut away the wood, or who cleared and tilled it—an ordinance binding on the whole Hindoo race, and which no international wars or conquest could overturn;" for, as the author a little farther on observes, we may "trace a uniformity of design which at one time had ramified wherever the name of Hindoo prevailed; language has been modified, and terms have been corrupted or changed, but the primary pervading principle is yet perceptible."

Malcolm (Vol. II., p. 25) says: "The settled and more respectable hereditary cultivators of Central India have still many privileges, and enjoy much consideration. Their title to the fields their forefathers cultivated is never disputed, while they pay the Government share. If they are unable from age or want of means to till their field, they may hire laborers, or make it over to another person, bargaining with him as they like about the

Tod's Note.—"The d'hooba grass flourishes in all seasons, and most in the intense heats; it is not only 'amara,' 'immortal,' but 'a'khye,' not to be eradicated, and its tenacity to the soil deserves the distinction."

produce; but the field stands in the Government books in the name of its original tenant. In general, a fixed known rent and established and understood dues or fees are taken from such persons, beyond which all demands are deemed violence and injustice. These, however, have been of late so universal that the condition of the hereditary cultivators as compared with others has been little enviable.

Buchanan puts the right somewhat lower, and more like that recognized by our modern law.

He says (Vol. I., p. 124): "The ryots or farmers have no property in the ground; but it is not usual to turn any man away so long as he pays the customary rent. Even in the reign of Tippoo, such an act would have been looked upon as an astonishing grievance."

Again, Vol. II., p. 90, after describing the different kinds of headmen or renters of villages, he adds: "Neither can legally take from the cultivators more than the custom of the village permits. This custom was established by one of the Mysore Rajahs." And same Vol., p. 109: "A farmer cannot be turned out of his possession so long as he pays the fixed rent; but if he gives over cultivation, the officers of Government may transfer his lands to any other person."

We might probably consider this to be a very accurate description of the old state of things in Bengal.

For an exact account of the state of things prevailing in Bengal at the time of the Permanent Settlement, and the terms on which the settlement was made, so far as the present question is concerned, it is really hardly necessary to look beyond the very text of the Regulations themselves.

The nature of the ancient rights of the ruler or superior landlord is thus shown:

Preamble to Regulation XIX. of 1793.
Same words repeated. Preamble, Regulation XLIV. of 1793.

"By the ancient law of the country, the ruling power is entitled to a certain proportion of the produce of every beegah of land (demandable in money or kind according to local custom), unless it transfers its right thereto for a term or in perpetuity, or limits the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of SUCH PROPORTION of the produce and the sum payable to the public, whilst he continues to discharge the latter."

Preamble of Regulation II. of 1793.
Regulation I. of 1793, Section 7, Clause 1.

Previously to the Permanent Settlement, the zemindars had very limited rights, and were liable to be capriciously dispossessed, and arbitrarily assessed upon an account of their gross receipts. "The amount of assessment was fixed upon an estimate formed by the public officers of the aggregate of the rents payable by the ryots or tenants for each beegah of land in cultivation, of which, after deducting the expenses of collection, ten-elevenths were usually considered the right of the public, and the remainder the share of the landholders."

Regulation I. of 1793, Section 7, Clause 1.
Same, Clause 2.

By the Permanent Settlement the amount of assessment on the zemindars was irrevocably fixed; they were declared to be proprietors of the land, and they were encouraged to "exert themselves in the cultivation of their lands under the certainty that they will enjoy exclusively the fruits of their own good management and industry, and that no demand will ever be made upon them or their heirs and successors by *the present or any future Government* for an augmentation of the public assessment, in consequence of the improvement of their respective estates."

Regulation I. of 1793, Section 8.

But general reservation was made that "the Governor-General in Council will, whenever he may deem it proper, enact such Regulations as he may think necessary for the protection of the dependent talookdars, ryots, and other cultivators of the soil."

Hence it appears that the rights, first of the ruling power, and eventually of the zemindars to whom those rights were

assigned, consisted in the share of the produce of every beegah leviable from the ryots in money or kind according to custom.

Regulation VIII. of 1793, Section 52.

The zemindar also acquired the power "to let the remaining lands of his zemindaree or estate *under the prescribed restrictions* in whatever manner he may think proper."

The zemindar therefore took the estate, subject to certain restrictions, in addition to his obligations to discharge the Government revenue. What then are these restrictions?

Regulation VIII. of 1793, Sections 52, 54, 55, 57, and 59.

The zemindars are to grant pottahs to the ryots, which "shall be specific as to amount and conditions. The rents paid by the ryots, by *whatever rule or custom they may be regulated*, shall be specifically stated in the pottahs, which, in every possible case, shall contain the exact sum to be paid by them. He (the zemindar) shall, in concert with the ryots, consolidate the impositions under the name of Abwab, Mhatoot, and other appellations with the *Assal* into one specific sum," and he shall not "impose any new Abwab or Mhatoot upon the ryots under any pretence whatever. A ryot, when his rent has been ascertained, may demand a pottah," and the pottahs must all be settled by the end of the year 1198.

Regulation VIII. of 1793, Section 60. Ditto ditto.

Again, all leases made previous to the conclusion of the settlement (and not obtained by collusion, &c.) are to remain in force till their expiration, and "no proprietor shall cancel the pottahs of the khood-kasht ryots except upon proof that they have been obtained by collusion, or that the rents paid by them within the last three years have been reduced below the nirkbandee of the Pergunnah, or that they have obtained collusive deductions, or upon a general measurement of the Pergunnah for the purpose of equalising and correcting the assessment."

Regulation IV. of 1794, Section 6.

Further, it was enacted that, "if a dispute shall arise between the ryots and persons from whom they may be entitled to demand pottahs regarding the rates of pottahs, it shall be determined in the Dewanee Adawlut of the Zillah in which the lands may be situated, *according to the rates established in the Pergunnah for lands of the same description and quality* as those respecting which the dispute may arise."

Regulation IV. of 1794, Section 7.

And, "The rules in the preceding Section are to be considered applicable, not only to the pottahs which the ryots are entitled to demand in the first instance under Regulation VIII. of 1793, but *also to the renewal of pottahs which may expire* or become cancelled under Regulation XLIV. of 1793; and to remove all doubts regarding the rates at which the ryots shall be entitled to have such pottahs renewed, it is declared that *no proprietors shall require ryots, whose pottahs may expire or become cancelled under the last-mentioned Regulation, to take out new pottahs at higher rates than the established rates of the Pergunnah for lands of the same quality and description, but that the ryots shall be entitled to have the pottahs renewed at the established rates.*"

It is thus clear that, as regards the then existing ryots, the zemindar had no power to fix rents at discretion, but was bound to consolidate the established "Assal" and "Abwab" into one sum, "in concert with the ryot," to give pottahs for the sums so ascertained, and to renew expired and cancelled pottahs; that all disputes regarding the rates were to be settled by the Courts according to the established rates of the Pergunnah; and that, at any rate, with respect to "khood-kasht" ryots, the zemindar had no power to cancel or refuse to renew pottahs once granted, or to eject the ryots. Rents were absolutely and entirely regulated by custom, and not by competition.

Regulation XLIV. of 1793, Section 2.

By another Regulation zemindars were declared not competent to "fix at any amount the jumma of an existing dependent talook for a term exceeding ten years, nor to let any lands in farm, nor to grant pottahs to ryots or other persons for the

cultivation of lands for a term exceeding ten years." But this provision was subsequently repealed with retrospective effect by Regulations V. of 1812, Section 2, XVIII. of 1812, Section 2, and VIII. of 1819, Section 2, by which all such leases were rendered valid and legal, and zemindars were declared competent to grant pottahs at any rent for any term. The object of the original enactment was not to prevent the zemindar's settling permanent ryots at the Pergunnah rates, but to prevent his granting improvident leases below those rates; for, as observed by the Privy Council in a late case turning on another part of the same Regulation, and with respect to such restrictions—"their meaning is properly to be collected from the policy and intent of the Regulation. The object of the Government was that the jumma should be duly paid, and that the means of paying it should not be withdrawn by improvident grants. The power given to the purchaser supposes the talookdars and the ryots to remain in all respects as before, except that they become liable to a certain limited increase of rent according to the established usages and rates of the Pergunnah or District." The power of the proprietor himself was certainly not greater than that of the auction purchaser. As observed by Lord Cornwallis in his Minute—

Privy Council decision; Ranee Surnomoyee *vs.* Maharajah Suttes Chunder Roy, 23rd July 1864.

"The rents of an estate can only be raised by inducing the ryots to cultivate the more valuable articles of produce, and to clear the extensive tracts of waste lands."

Looking to the expressions regarding the expiry and renewal of pottahs, and the advantage to be derived from more valuable articles of produce, I imagine that the framers of the early Regulations very probably contemplated periodical readjustment of rates between zemindars and ryots with reference to the value of produce, in the same way as was originally contemplated in Akbar's settlements (Elphinstone, p. 476), the plan of which was that the money rates were to be fixed every ten years on the average rates of the preceding ten, that is, the grain rates remaining the same, the money rates were to be adjusted in proportion to the average price of grain. But no express provision was made to this effect in the Regulations of 1793.

It being then clearly established that, by the terms of the Permanent Settlement, the zemindars were not made absolute and sole owners of the soil, but that there were only transferred to them all the rights of Government, *viz.*, the right to a certain proportion of the produce of every beegah held by the ryots, together with the right to profit by future increase of cultivation, and the cultivation of more valuable articles of produce; it being further established that the khood-kasht or resident ryots retained a right of occupancy in the soil, subject only to the right of the zemindars to the certain proportion of the produce represented by the Pergunnah or District rates, we have next to consider the changes which occurred between the Permanent Settlement and the passing of Act X. of 1859. Little material change was made by the Legislature. The declaration of Regulation V. of 1812, that, where Pergunnah rates were no longer clear, the term "rates payable for land of a similar description in the places adjacent," should be substituted, is a mere accommodation of the existing law to the march of society. The only material change affecting certain estates is to be found in the gradually increasing stringency of the Sale Laws. During the first generation subsequent to the Permanent Settlement all new khood-kasht ryots settled by the proprietors on waste or other lands were in case of sale absolutely protected. The purchaser could neither evict them nor enhance their rents beyond the customary rates; he could but take rent "according to the established usages and rates of the Pergunnah or District." But, by Regulation XI. of 1822, this protection is narrowed to the case of any khood-kasht kudeemee (old khood-kasht) ryot or resident and hereditary cul-

Regulations XLIV. of 1793, Sec. 5; IV. of 1794, Sec. 7; VII. of 1799, Sec. 29, Clause 5; Privy Council decision in case of Ranee Surnomoyee already quoted.

Regulation XI. of 1822, Sec. 32.

tivator having a prescriptive right of occupancy." Perhaps we may infer that the purchaser acquired the right to terminate all other tenures created since the settlement, and to evict the holders. Still, as in truth this right of eviction was scarcely ever exercised, and it appears that, if not exercised, the purchaser was still limited to the Pergunnah rates "according to the law and usage of the country," the practical effect of this Regulation does not seem to have been great as respects the question now before us, and it is therefore hardly necessary to enquire what was the exact term of prescription which then made a man an *old* khood-kasht ryot.

Regulation XI. of 1822, Sec. 33.

By the latter Sale Laws, Acts XII. of 1841 and I. of 1845, stringent provisions were introduced. Protection was given to "khood-kasht or kudeemee" ryots, but the purchaser had power, not only to evict, but also to enhance, at discretion the rents of all other ryots. The sales under this Act were, however, comparatively few.

It may here be observed that, in truth, in the later enactments, the word "khood-kasht" is so variably coupled with other terms "kudeemee," "resident," "hereditary," "resident and hereditary," that it became very difficult to say who were privileged against auction-purchasers, and who came within the various descriptions of khood-kasht ryots. But I have no doubt that, as explained by Mr. Justice Trevor, the original khood-kasht of the early Regulations was simply the resident ryot permanently settled in the village as opposed to the py-kasht ryot. The two words khood-kasht and py-kasht are used as correlatives, and as between them including all ryots.

Such being the laws, it may be conceded that, from the time of the Permanent Settlement, the zemindars have been free to make such arrangements and contracts as pleased them regarding all land in which no rights were held by ryots or others at the time of the Settlement, or which at any time might lapse by the failure or abandonment of the ryots, subject only to this, that a man once admitted on an ordinary khood-kasht tenure, without limitation of time, could not be ejected or enhanced beyond the customary rates, except in certain cases by an auction-purchaser. The question is, what in fact did the zemindars do? Did they, by the investment of capital, cultivate the waste for their own benefit? Did they take every opportunity of asserting an absolute right in every field that lapsed, and farm it out on true commercial principles? Or did they, in truth, adhere to the old practice and custom of the country, and seek to increase the rent-roll, merely by settling new ryots on the old customary terms, leaving them to cultivate in their own way, and to occupy the land without limitation of time, subject to the payment of the rents established by the custom of the locality? It is notorious and well established by history, both general and judicial, that the latter was almost the universal rule. The zemindars did not invest capital in agricultural operations after the modern fashion. They did not seek to get rid of the old ryots and the old system, and to establish large commercial firms. On the contrary, the endeavour was to get new ryots. Ryots were considered to be the only riches, and the struggle of a good landlord was not to get rid of the ryots, but to tempt away another man's ryots by the offer of favorable terms. The ryot who was settled on waste or other ryottee land cultivated it, stocked and furnished it, built his house, and dug his tank at his own expense, or by his own labor. Hence it naturally followed that, according to the ancient custom and present understanding between the parties, the new ryot who permanently settled in the village as a khood-kasht or resident ryot, acquired all the rights, privileges, and immunities accorded by usage to khood-kasht ryots. The ryots so settled were protected in the first instance by law in case of sale, and after the passing of Regulation XI. of 1822, they were in practice protected by habit and the interest of the purchaser, and resumed their former *status*. Of resident ryots, only the few who may have come in under special contracts at variance with the custom, or whose tenures passed under the Sale Laws of 1841 and 1845, held on any

other than the customary terms. In every case that comes before us, it is patent that, up to the present day, rents in Bengal are usually regulated by the customary rates; sometimes in the shape of Pergunnah rates, more generally in that of local rates, universally known in each estate or part of the country. Frequently, zemindars know nothing of their estates, have no clue to the actual positions of each jumma or ryot's holding, but simply collect on a paper roll showing the annual payment due from each ryot according to the custom.

But were the customary rates varied or enhanced, or how were they regulated? It seems a somewhat singular omission that in the Regulations no provision is made for any enhancement of the Pergunnah rates payable in money. The customary or Pergunnah rates were of three kinds:—

1. Grain rates, being the original share of the produce not commuted into money, and which generally continued to prevail in the province of Behar.

In this case, as the value of the grain increased—if taken in kind, it fetched more money—if annually struck in money at the market rates, more money was received—there was no need of any special provision for enhancement. The rent, as it were, enhanced itself.

2. & 3. Money rates more common in Bengal, *i. e.*, when the grain rents were commuted into money in either of two ways which are distinguished in Section 56, Regulation VIII. of 1793, as follow:—

2 "Where it is the custom to vary the pottah according to the articles produced thereon" (on the land), that is, there were established rates not for each kind of land, but for each kind of produce—so much per beegah for rice, so much for wheat, so much for cotton, so much for sugar-cane. In this case the zemindar would benefit by the substitution of more valuable for less valuable articles of produce; but the kind of produce remaining the same while it increased in value, he would not benefit.

And 3. The system which it was hoped would ultimately prevail where the rates were fixed not on each kind of produce, but on each quality of land, and thus there was fixed "a specific sum for a certain quantity of land, leaving it to the option of the ryots to cultivate whatever species of produce may appear to them likely to yield the largest profit." In this case, it is evident that, without some mode of enhancement, the zemindar would benefit neither by the introduction of new products, nor by the rise in value of the old products. The expression in Lord Cornwallis's Minute, that the zemindars are to benefit by "inducing the ryots to cultivate the more valuable articles of produce," does not seem to occur in the Regulations; and as respects land held on these money rates, no provision for such benefit seems to be made. In truth, it seems very doubtful whether, if the khood-kasht ryots paying these specific money rates had stood together on the letter of the Regulations and steadily resisted enhancement, they ever could have been enhanced.

It is remarkable that, throughout the whole litigation of the long period between 1793 and 1859, no principle of enhancement other than a reference to existing Pergunnah or local rates is anywhere to be found. There have been conflicting decisions as to the prescription by which a right of occupancy was acquired, and great doubt was thus thrown on that subject; but as regards any rule of enhancement, either at discretion, or on any other rule save and except the standard of rates paid by the same class of ryots in places adjacent, there is nothing. We have particularly drawn the attention of the Counsel on both sides to this point, and it is clear that there is no such case. When the customary rates were enhanced, it must have been done without the least assistance from the law or the Courts of Judicature. In fact, however, the rates have generally been enhanced. The zemindars had great power over their ryots; the interference of the law was but partial; the zemindars could do much without law; and the reliance of the ryots was much more on custom than on law.

Moreover, in this matter, the zemindars had a strong equity on their side. Although no rule of enhancement was laid

down by the law, it seemed hard that as the relative value of produce and money altered, as produce became relatively more valuable, and money relatively less valuable, the zemindar should continue to receive, as representing his share of the produce, a sum of money actually representing a smaller purchasing power, a smaller quantity of grain, and a smaller proportion of the produce. The fact seems to be that this contingency of a change in the relative value was omitted to be provided for.

But, as the country progressed, and as the zemindar's expenses increased, without a corresponding increase of income, he had, according to custom and ancient rule, a strong equitable claim to a re-adjustment which should restore to him his own fair share of the produce. Power and equity being then combined, it is not wonderful that, in the absence of any regulated mode of adjustment, it was irregularly effected by various irregular devices resulting in compromise between the zemindar and the body of the ryots. As Harington puts it, "every part of the transaction is a subject of contention; the demands on both sides are unreasonable, and are finally terminated by a compromise."

A common process seems to have been a mere repetition of the old process by which Tooran Mull's assessment was enhanced. In spite of the prohibition against adding abwabs, or cesses, to the consolidated rates of the time of settlement, illegal cesses (almost always in the regulated form of percentages, so many annas or pie in the rupee, or so many seers in the maund) were from time to time added on, and gradually annexed to the custom; then as they became complicated and heavy, and led to resistance, compromise was effected, and the extra cesses were merged into a rate somewhat enhanced, to which the ryots consented. Then, as further increase of value took place, more cesses were super-imposed on the rates, and presently another compromise took place. Sometimes in one way and sometimes in another, the rates by mutual compromise and consent were from time to time enhanced, and the Pergunnah rates were frequently split up into local rates special to estates and sub-divisions, according to the area of each new compromise. Still the new rates always had and have some local area. They were and are common to the body of the ryots of that locality. When the majority or body of the ryots had consented to an equitable compromise, an enhanced local rate was established, and refractory individuals could be and were raised to that standard.

The nature of the occupancy tenure of the ryots of the class under discussion, as it existed prior to the passing of Act X. of 1859, cannot be better described than in the words of the Right Honourable Holt Mackenzie, in his evidence before the Select Committee of the House of Commons in 1832—

"They may be generally described as cultivators possessing a fixed hereditary right of occupancy in the fields cultivated by them, or at their risk and charge; their tenure being independent of any known contract, originating probably in the mere act of settlement and tillage; and the engagements between them and the zemindar or (in the absence of a middleman) the Government Officer, serving, when any formal engagements are interchanged, not to create the holding, but to define the amount to be paid on account of it. They cannot justly be ousted so long as they pay the amount of value demandable from them; that being determined according to local usage, sometimes by fixed money rates, or rates varying with the quality of the land, or the nature of the crop grown—sometimes by the actual delivery of a fixed share of the grain produce—sometimes by an estimate and valuation of the same—sometimes by other rules; and what they so pay is in all cases distinctly regarded as the Government revenue or rent, whether assigned to an individual or not; in none depending on the mere will and pleasure of another. There are varieties of right and obligation which one could fully explain only by a reference to individual cases; but this is my general conception of the rights of the class whom I should consider the proprie-

tors of the fields they occupy. In Bengal Proper they are usually called "khoodkasht ryots (*i. e.*, ryots cultivating their own), *and by this class of persons I believe the greatest part of the lands in that Province is occupied.*"

At the time of the passing of Act X. of 1859, then the state of things was this. The tenures and rents of the ryots were still for the most part regulated by the old customs of former times. But two things especially required legal definition.

First.—There was doubt as to the mode of prescription by which a khoodkasht or occupancy tenure was acquired, and which tenures were of this character. It was not certain whether mere settlement in the village on the ordinary terms without limitation of tenure gave such a right, or what length of prescription established that right. The various Sale Laws had also introduced a large element of confusion, different estates being variously affected according to the date of sale. And, what is perhaps most important of all, owing to the absence of public records in Bengal, the perishable nature of private evidence, and the discredit attaching to private documents and oral evidence in this country, it was very difficult to prove whether a ryot's holding was really ancient, or what was the date of its creation; the oldest holdings were imperilled by the absence of reliable proof.

Second.—There was an entire want of any regulated and defined legal mode of enhancing the customary money rates.

Setting aside re-enactments and details, the most important provisions of Act X. referred to these two points.

Section 1 expressly repealed the existing Sale Laws so far as they gave rights of ejection and enhancement beyond the customary rates.

Section 6 declared that 12 years' holding was to be taken as the test of a prescriptive right of occupancy, unless the presumption was contradicted by an express written contract (Section 7). That was a protection in favor of the ryot, settling all doubt as to the rights of those who had held so long.

Sections 5, 13, and 17, declared the right of the zemindar to enhance the rents of all tenures which had either submitted to enhancement since the Permanent Settlement or had been created without specific stipulation since that period, provided it was proved that the former rent was not fair and equitable, and that the grounds of enhancement should be confined to certain particular grounds specified in Section 17.

At first it appears to have been intended to confine these grounds to two, in accordance with the letter of the old Regulations, *viz.*:—

1. That the rent paid by any ryot was below the prevailing rate paid by the same class of ryots in the places adjacent; and

2. That the ryot held more land than he paid for.

But before the Bill finally passed, a third very equitable ground of enhancement was added, giving the zemindar the right to claim an increased rent in consequence of the increased value of the produce—an increase which both the old custom of division of produce would have given him, and the subsequent practice had in fact without express provision of law more or less given him. Enhancement might henceforth be awarded on the specific ground "that the value of the produce or productive powers of the land have been increased otherwise than by the agency and at the expense of the ryot." This was a new provision in favor of the zemindar.

It appears, then, that the principal provisions of Act X. were in fact those by which on two points the hitherto rough and somewhat uncertain unwritten practice was reduced to definite law—in one case, in favor of the ryot, by defining the prescriptive right of occupancy—in the other in favor of the zemindar, by acknowledging the right to enhancement on the ground of increase of the value of produce. It is with this latter provision that we have now to deal. Unfortunately the law, while stating the ground of enhancement, does not exactly specify how it is to be applied. Hence the present difficulty.

Taking the words of Section 17 alone, enhancement may, it is argued, be applied in three ways :—

First, Mr. Doyne seems to argue that, when increase of value has occurred, the old rent is as it were expunged, and a new rent is to be fixed without any reference either to the amount of the old rent, or to the amount of increase in value, or to the custom, but simply at the competition or market-rate which the land would fetch in the market—at the rate which any person bidding on purely commercial principles would give for it. But the Judges of this Court seem now to be all agreed that the nature of an occupancy tenure and the provisions of Act X. of 1859 altogether negative this extreme doctrine of competition rates ; that, in fact, the increase of rent must in some shape or other be measured and limited by the increased value of the produce when that is the ground on which increase is sought.

It remains, then, only to decide on the remaining modes of applying this ground of increase, *viz.* :—

Second, the whole increase in the value, after deducting the actual increase in cost of production, may, it is said, be given to the zemindar ; or,

Third, the rent may be increased in the same proportion as the value has increased, so that the relative situation of the parties may remain as before, and if there were profit shared between them under the old arrangement, any new profit may also be shared between them.

To decide this question, it has been thought necessary to go beyond the Act itself. The view which seems to have been taken by the learned Chief Justice in Hill's case, and which is now supported by Mr. Doyne, is that Section 6 must be considered not to be in any respect a definition of pre-existing rights of parties having different interests in the soil, but a new provision—a sort of benevolent interference between the absolute owners of the soil and the tenants who had heretofore held under them at their mere will—an interference with vested rights of property on one side in favor of those who had no rights whatever on the other side in violation of the ordinary rules of property and Political Economy ; that therefore such a provision must be construed very strictly in favor of the old proprietor and against those on whom these new rights were thus arbitrarily conferred ; and that, under such a construction, the ryots can only have the rights of occupancy expressly given to them, while the zemindar must take in the shape of rent all the beneficial interest created by change of circumstances. At any rate, it seems to have been considered by the learned Chief Justice that, if any ryot claims any higher right than that above expressed, he must prove it altogether independent of the provisions of Act X.; that upon him lies the whole onus of proving some ancient tenure and custom prior to the Permanent Settlement under which he can claim some other rate.

I cannot take this view of the nature and intent of Section 6. Its form is altogether declaratory. It may be, and probably is, the case that in substituting for the previous uncertainty a new and comprehensive definition, some persons were included in the terms of the definition whose claims were not before well established ; but it seems to be quite beyond doubt that it was the intention of the Legislature to declare existing rights, not to create wholesale an entirely new class of rights. No general right of occupancy is given to all tenants who have held for twelve years. By the terms of Section 6, express exception is made in regard to "land belonging to the proprietor of the estate or tenure," that is, land absolutely owned by him as distinguished from the ryottee land. When such land, called "khamar, neejote, or seer," is let either for a term, or year by year, as also when the land of occupancy ryots is sub-let by them, no length of holding gives a right of occupancy. Further, as respects ryotee land, by the express provisions of Section 7, every written contract inconsistent with the right of occupancy over-rides all claim to such right, it being reasonably assumed that, in the absence of express written contract, the ordinary custom prevailed, and the ordinary prescription ran. The

declaration establishing a test by which the right of occupancy is to be tried only affected those cases in which there was nothing, either in the character of the land or in the written contract, to contradict that declaration.

If there could be any doubt as to the intention of the framers of the Act, as evidenced by the declaratory form of the words, it is set at rest by the actual recorded expression of those intentions. Among the papers printed and put into our hands on the trial of this case is an extract from the Report of the Select Committee of the Legislative Council, which settled the details of Act X. of 1859; and this shows exactly how this 12-year Clause got into its present position. This passage is as follows:—

"*Section 6.*—The laws in force speak of khood-kasht ryots as possessing rights of occupancy and in some places the word 'khood-kasht' seems to be considered as synonymous with 'resident.'* '*Resident*' was therefore the word used in the original Bill. But it has been pointed out by the Western Board that residency is not always a condition of occupancy; and it appears that, after much enquiry, it was prescribed by an order of the Government of the North-Western Provinces in 1856, as most consistent with the general practice and recognised rights, that a holding of the same land for 12 years should be considered to give a right of occupancy. We have followed this precedent, and altered the Section accordingly."

* Regulation LI. of 1795, Section 10; Regulation VIII. of 1819, Section 11, Clause 3, and Section 18, Clause 5.

It would probably not be proper to use this evidence with the view of altering the ordinary meaning of the words of the Act; but it may fairly be used to support their plain declaratory form and meaning against a forced and less obvious construction. It is, then, absolutely certain that (whether or not they were strictly and exactly right in the definition adopted) it was the intention of the Legislature to declare and define existing rights)—not to create a new class of rights; and in that sense the plain words of the Legislature must be taken. The 12-year rule, thus declared and established, covered the great mass of resident ryots who had held so long or much longer, and relieved from the burden of proof ancient ryots whose proofs could not be carried back beyond a limited period. It amounted, in fact, to this. All holders of ryottee lands who can prove a 12-year holding shall be presumed to be ryots of the occupancy class, unless the contrary is proved by express written contract (under Section 7). If, in Bengal, some comparatively few py-kasht ryots were wrongly included in the definition, that is an accident, and not the rule. This creature of Act X., whom it is sought to make the normal occupancy-ryot, seems to be in practice a rare creature. He is more common in theory than in actual cases. Probably most of those to whom the old custom did not give such rights do not now assert them. At any rate, in all the cases which have given rise to this reference, the ryot claims much older rights, and the real contention is almost always with men of a much higher class. In Hills' case the ryot, we gather, claimed to have held from ancient times, and it was admitted that he had held for at least 30 years. In the present cases, no attempt is made to contradict or deny the ryot's assertion of ancient holding. There is generally little or no contest about the occupancy character of the holding. It would then, it seems to me, be most unjust to assume (till the contrary is proved) that the occupancy-ryot, whose right is tested by the definition declared by the law, is a mere creature of Act X., who had no rights whatever before that Act passed, and so to throw on him that burden of proof of which it was the very object and essence of the law to relieve him—a burden which, if, according to a hard construction, it is necessary to prove his holding from before the Permanent Settlement, it will now at this distance of time be almost impossible for him to bear. Such a construction would, in fact, reduce the great mass of the ancient ryots to the *status* of the most recent holders.

It seems to me that the presumption and *onus* are now quite the other way;

and that any argument founded on the recency and character of a holding which comes within the definition prescribed by law must be supported by proof that the tenure really is one of the recency and character on which the argument is based.

The right of occupancy is declared by the law—that is not now in question—but for other questions connected with the incidents of such tenure, it must, I think, be presumed that every man who comes within the definition is an occupancy or khood-kasht ryot according to the custom of the country, and that his tenure has the ordinary incidents of such a holding according to the ordinary custom: all this should be presumed till, at least, the contrary is proved.

Now, it is quite certain that the ordinary and most important incident of an occupancy tenure is a right to hold at a customary rent according to the usage of the places adjacent. It might be a question whether the effect of a new definition, which might include in the class of occupancy-ryots some persons not before belonging to that class, would be to promote them to all the privileges and incidents of the ordinary occupancy tenure. I think that, at any rate, every occupant ryot must be *primâ facie* presumed to hold under the ordinary customary law, and subject to the ordinary incidents; that, if it be proved that the tenure was hitherto subject to other incidents, then in such a case the new law may be construed strictly, and only those new rights will be acquired which the law expressly gives or the custom presumes on points uncontradicted by evidence; when other incidents, not absolutely inconsistent with the right of occupancy given by the law, are proved, then those incidents will continue attached to the occupancy tenure.

We deal then, first, with the ordinary occupancy-ryot, whose rent is not shown to be otherwise than an ordinary customary rent. How is that rent to be enhanced on account of increase in the value of the produce?

It seems to me to be certain that the customary rent represents the proportion of the produce which was the ancient right of the ruling power; and that, if that rent be, as it were, resolved into its original elements, it will, when expressed in money, increase with the increase in the value of the produce exactly in proportion to that increase. The old proportion of the produce, the right first of the Government and afterwards of the zemindar, was in Bengal commuted into Pergunnah rates expressed in money. Those Pergunnah rates were in course of time transmitted in a somewhat altered form, and became the modern "rates paid in the places adjacent." But still these modern customary rates of the present day are the direct descendants of the old rates expressed in the form of a proportion of the produce. So long as the grain rates were from time to time converted into money, they rose in proportion to the increase of value; and, since they have been permanently commuted into money-rates, no other rule of enhancement is anywhere to be found. The only other systematic mode of enhancing the customary rates known to history also follows the method of proportion, *viz.*, that by "Abwabs," or cesses, added to the "Assal," or original rates, in the shape of a percentage or proportion, as clearly shown by Sir John Shore in the extract and example quoted from him by Harington, Vol. III., p. 435:—

"At present there are many Abwabs or cesses collected distinct from the Nirikh, and not included in it, although they are levied in certain proportion to it. The following abstract of a ryot's account will show the mode in which this is done:—

	Rs.	A.	Gs.	Cs.	Rs.	A.	Gs.	Cs.
Rent of beegahs 7-12-7 of land ...					14	0	8	0
ABWABS OR CESSES								
Chout at 3-16ths per rupee	2	10	0	0				
Poolbundee 1-24th of the jumma	0	9	7	2				
Nuzzerana 1-12th	1	2	15	0				
Manjan 1-12th	1	2	15	0				
Foujdaree 1-16th	0	14	15	0				
Company's Nuzzerana one month's and a quarter's rent	1	7	0	0				
Batta one anna per rupee...	0	14	0	0				
					8	12	2	
Total ...					22	12	10	2
Khelat at 1½ anna per rupee of the above sum					2	2	1	2
Total ...					24	14	12	0"

f

History and equity seem to me both directly to point to the rule of proportion, that is, that, as the value of produce increases, the rent should increase in the same proportion.

As respects the other mode by which the whole increased value is added to the rent and given to the landlord (still dealing with the ordinary occupancy-ryot holding on a customary rent), it seems to me—

First.—That it is inequitable to give to one of two parties interested in the soil the whole of any profit arising from it; and, *second*, that it is at variance with the old arrangement between the parties, and the old practice, and inconsistent with the nature of the customary rents.

Third.—This mode seems to me to necessitate the consideration of elements of calculation not contemplated by the law, and to become in practice impossible of application. In order to ascertain the comparative or proportional increase of value, it is not necessary to ascertain the actual gross produce of the land at either one period or the other, but only the relative value of the staple products at the two periods. Mere price currents, showing, *e. g.*, the market-price of rice at the different periods, are sufficient to show that the value of the produce of rice-fields has doubled (increase of productive power not being alleged). But, to ascertain the absolute increase of the value of the gross produce, we must begin by ascertaining, not only the price current, but also the actual quantity produced. Nor is that enough. It is manifest that, with the general increase of prices, the cost of production will also ordinarily more or less increase (in fact, the food of men and cattle and many other things are directly affected by the same increase), and to give to the zemindar the whole increase in the gross value of the produce would be a great injustice. Hence every such calculation supposes that the cost of production at either period must also be calculated. This is introducing a new element not mentioned in the law, and it involves a much more difficult calculation, such as was attempted in Hills' case. I believe it to be beyond dispute that, in practice, it is wholly and absolutely impossible for the Courts to arrive at a safe and correct result, showing the true rent and actual net increase of value by this process It may in some places be possible to ascertain market-rates of rent; but to ascertain the true rent by the process indicated in Hills' case is, I believe, wholly impossible.

I would therefore reject this mode as being—

1.—Not fair and equitable.
2.—Contrary to custom and law.
3.—Practically impossible.

To return to the method of proportion. A subsidiary question has been a good deal argued, *viz.*, whether, before applying it, the cost of production should also be taken into consideration. It is said that the cost of production may not always exactly follow the value of produce; that it may sometimes increase in a greater or less proportion relatively to the increase in the price of produce, or may remain stationary, or decrease when prices increase, or *vice versa*. The latter supposition is not probable in this country. As has been said, many of the items which enter into the cost of production are identical with those which make up the value of products or very closely follow them; and some of the objections to dealing with this element have already been noticed. It may, however, be admitted that, more or less, the increase in cost of production may somewhat vary from the ratio of increase of value of gross produce; and it might be the strictest theoretical equity to calculate first the net value of produce after deducting the cost of production, and then to apply the rule of proportion to this net value.

I think, however, that the law contemplates, as ground for increase of rent, the gross value of the produce, and not the net value. The cost of production is not mentioned, and no increase of rent could be sought on the ground that the cost of production has decreased. That would be one of the accidents the advantage of which is left to the ryot.

Then it is certain that, in the original division of the produce on which the

customary rent is founded, no variation is allowed on account of variable cost of production. It is presumed that, in a rough and general way, the value of produce and cost of production sooner or later follow one another. In fact, originally, there was hardly any such distinction. No money calculation entered into the matter. The ruling power took its share of the produce; the ryot and his family and his cattle consumed their share, and paid out of it in grain the dues of the village carpenter and blacksmith and weaver. It is therefore only consistent in following out the old analogy to follow it out in the old way, not in a new way. However theoretically equitable, a calculation of the costs of production would in practice only introduce an element of confusion not contemplated by the law. As a decrease in the cost of production, the value of produce remaining stationary, would clearly, under the law, as it stands, be the profit of the ryot, so if the rate of increase of some items of the cost of production somewhat lags behind, and is slower in attaining its maximum than the increase in market-value of produce, that also is an accident which the law and custom give in favor of the ryot. In the more improbable case in which the cost of production might increase in a greater ratio than the value of produce, that might be an accident against the ryot. But my own opinion is that, ordinarily, this can happen only in countries where corn is largely imported, and that is certainly not likely to be the case in Bengal and the valley of the Ganges. In this country a great labour market has always greatly raised the price of grain: witness much recent experience in many parts of India. And it may be observed, as a means of getting over any theoretical difficulty arising on that score, that there is a singular difference between Sections 17 and 18 of Act X., which can hardly be mere accident, *viz.*, that, while Section 17 strictly provides that there shall be no enhancement except on one of three specific grounds, Section 18, immediately following, merely declares certain grounds of abatement, but omits the words which would limit all abatement to those particular grounds. It may be that if, by an extreme accident, an excessive increase of cost of production, without corresponding increase in prices, rendered the ryot's rent, as adjusted by custom and proportion, permanently higher than the market-value, he might claim a reduced pottah on general grounds of fairness and equity. That, however, is beyond the present question; and it may be generally observed that, in dealing with customary rights, we can hardly strictly apply those rules of Political Economy which assume competition principles to the exclusion of custom and moral force.

I think, then, that in the case of all occupancy-ryots holding on rents which may be presumed to be customary, or in regard to which no other established rule of enhancement can be shown, enhancement sought on the ground of increase in the value of produce should be decreed exactly in proportion as the current prices of the staple articles of produce yielded by the land have permanently increased. The last adjustment by mutual consent must (in the absence of any special stipulation) be considered to have been at that time the fair and equitable rent by which both parties are bound. Either party may go so far back if he chooses, but no farther. The party coming into Court must show the increase of price at the present period as compared to that period, or to a series of subsequent years. If subsequent years be taken, or the date of the last adjustment does not appear, the opposite party may carry his evidence as far back as he pleases, so that a last adjustment be not overstepped. The increase will be calculated on the average of a few years at the period farthest back (and consequently nearest to the last adjustment) so shown as compared to the average of recent years. The officer making the calculation must, of course, be satisfied that there is a real increase in the value of the produce likely to be durable, and that the rise in prices is not the temporary result of bad harvests, an occasional extraordinary demand, or any such irregular cause.

Of course, the whole of the above has reference to increase sought under Clause 2

Section 17 only. The old rule, that ryots holding for any reason (other than express and binding stipulation of the zemindar) at rates below the customary rates, can at any time be raised up to those rates, is distinctly re-enacted by Clause 1; and exceptionally low rates can always be adjusted to the rates payable by the same class of ryots in places adjacent under that Clause, independent of increase on account of increased value of produce. But if the adjacent rates have already been increased on account of increased value of produce, a double increase on that ground of course cannot be had by taking advantage of the same element under both Clauses.

There remains only the case where it may happen that the contract under which the ryot holds, though so indefinite in regard to the term of holding as not to defeat the claim to right of occupancy, still shows that the rent was *not* a customary rent, and supplies materials from which some rule of enhancement other than the customary rule can be found—e.g., when the pottah is for rates above the customary rates, and shows that it was based on some other calculation, or stipulates for renewal at market rates. On the zemindar's proving such a case (and in such a case only), enhancement may be decreed on the basis supplied by the original contract, and on the customary basis; provided only the case comes within the terms of Section 17 of Act X. as respects some ground of enhancement. Low rents on special stipulations would first be adjusted under Clause 1 by raising them to the full local rates.

The only difficulty as regards the practical working of the simple and direct rule of proportion would be the case in which the crops produced have been wholly changed; where, for instance, some new and valuable staple has been introduced. It may be said, you may compare rice with rice, or wheat with wheat. You may also compare two different staples, which, according to the old custom, were divided in the same proportion; but you cannot compare rice with sugar-cane; they are, as it were, incommensurate quantities. This case has not yet been presented to us, and I understand that in Bengal there is not the same rotation and variety of crops which we have in other parts of the country. Rice land, I am told, usually remains rice land, till by artificial means the character of the land itself is changed. The crop is not changed without a change on the surface of the land by which it is removed into another class. If that be done by the ryot, the increased value of produce resulting is not a ground of enhancement of rent. But it may be necessary to meet the case of new or improved staples. It will generally happen that the introduction on the old ground of new staples, rendering it more valuable, will raise the value of the old staples in much the same proportion. For instance, the excessive rise in price and consequent extension of cotton cultivation in Western India has led to an equal rise in the price of grain. In such a case the increase of value caused by new staples may be measured by the increased price of the old staples. But if this cannot be done, it is certainly the case that rice and sugar-cane (as an example) are incommensurate things. Staples of great value, which owe most of their value to the large expenditure of capital in their cultivation, cannot be compared to those which a light cultivation obtains easily from the land. That is known and recognized by all the Revenue systems of Native States, which are generally regulated in this respect by wonderfully correct principles of Political Economy: Not only does the State proportion of different crops vary according to the nature of the cultivation required, but in arid parts of the country irrigated crops of any particular grain pay a smaller proportion than unirrigated crops of the same grain, because a greater proportion of the former is due to labor and capital. And sugar-cane, cotton, vegetables, and such valuable products always pay fixed money rates, so that the extra expenditure of capital is not taxed. When, then, new staples have been introduced, and no sufficient measure can be derived from the increased value of old staples, in that case

only it may be necessary so far to depart from the direct proportion of current prices, and equitably to estimate, as best may be, the actual increase in the annual value of the land, increasing the rent in the proportion of that increase. If such a case arises, the rule of proportion may, I think, in some shape, still be applied.

To sum up, the question principally argued before us seems to be simply this: "Are the zemindars absolute owners of the soil, and the ryots persons without any other right than one recently conferred upon them, to protect them against capricious ejectment, namely, a right of occupancy at full market or competition rents; or have the ryots also certain rights in the soil by law, custom, and prescription?"

That question we are, without disagreement, disposed to answer by saying, "all occupancy-ryots are not necessarily of one class. While some have high customary rights, others may possibly be mere tenants-at-will recently converted into occupancy-ryots. The substantial difference is only as respects the *onus* or ordinary presumption.

The majority of the Court seem to be of opinion that a ryot who has held for 12 years and upwards must be presumed to be a khood-kasht ryot, and entitled to the privileges of the "khood-kasht" of the laws till the contrary is shown; and that if it be shown that the ryot has come in at a date subsequent to the Permanent Settlement, still, if he came into the village as a khood-kasht or resident ryot, or has held more than 12 years without any express contract and at customary rates, he must be presumed to have acquired by consent, law, custom, and prescription the ordinary customary privileges in regard to the rate of rent. That custom traced to its origin gives us the rule of proportion.

We are all again agreed that if, in a possible case, a written contract inconsistent with the customary rates, and a holding under that contract, be proved, effect must be given to the contract, except so far as it is varied by the strictest interpretation of the provisions of Act X. of 1859.

I would return to the Division Bench the answer proposed by Mr. Justice Trevor.

Mr. Justice Shumboonath Pundit.—I agree with Mr. Justice Trevor, except with regard to certain remarks in his judgment concerning Sections 13 and 17 of Act X. of 1859. What is written below relates to those Sections and to matters which were discussed during and arise in the trial of this case, which are not noticed in detail by Mr. Justice Trevor, and which, I think, are necessary to be recorded to support the decision adopted by me, as well as to answer the arguments on the opposite side.

I have purposely avoided to write anything concerning the points of the case in which I agree with the other Judges, and regarding which they have written elaborate and learned remarks.

Section 17 of Act X. of 1859 provides that the rents paid by ryots having rights of occupancy without fixed rates cannot be enhanced except on the three following grounds:—

1st.—That the rents paid by the ryots are below the rate paid by the same class of ryots for similar lands in the neighbourhood having similar advantages.

2nd.—That the value of the produce or the productive power of the lands has increased otherwise than by the agency or at the expense of the ryot.

3rd.—And that the lands held by the ryot are proved on measurement to exceed the quantity for which rent was previously paid.

An enhancement supposes an existing rate or amount of rent to be increased.

The last of the three grounds mentioned above, properly speaking, is not one for enhancement, but only for adjustment of rents. The second might include a rise in the value of the produce or the productive powers of the land at the expense of the landlord The first ground presupposes that the rents of the generality of the neighbouring ryots have been properly adjusted with reference to the surrounding causes, and have been brought up to the highest amount payable under the law.

In this part of the country the zemindars do not improve their estates by laying out any large amount of capital in

draining or otherwise improving the lands. In several localities they, however, advance seed or money to their ryots, build and maintain some embankments, or dig and keep clear and in a working order certain water-courses, or prepare some wells. All these works and proceedings generally are such matters of necessity that, without them, it would be impossible for the ryots to make any profitable cultivation. When the law speaks of an increase in the value of the produce or the productive powers of the soil at the expense of the zemindars if it is included in Section 17, generally it must mean to refer to expenses like those mentioned above, and not of any greater magnitude.

Section 18 provides that a ryot having a right of occupancy can ask for an abatement of his rents on the ground of diminution by diluvion or otherwise, or decrease in the value of the produce or of the productive power of the land, or on the ground of the lands being, on measurement, found to be less than the quantity for which he was paying rents. Whether he can ask for an abatement also upon any other ground is not intended to be decided by this Section. It is, however, clear that the list given above is almost exhaustive of all the reasonable grounds for abatement. Any decrease in the costs of production not being made a ground for enhancement, an increase in the same would not be a just ground for an abatement.

Section 13 provides that under-tenants or ryots who hold or cultivate without written engagements, or under written engagements not specifying the period of such engagements, or whose engagements have expired or have become cancelled in consequence of the sale for arrears of rent or revenue of the tenure of the estate in which the lands held or cultivated by them are situated, and which have not been renewed, shall not be liable to pay rents at an enhanced rate, unless notice be issued before the commencement of the year for which the enhanced rates may be asked. Under the proviso recorded at the end of Section 32, a suit for such enhanced rates may be instituted after three months of the expiration of the year for which such rents are asked.

The demand, however, may also be made at any time within three years from the expiry of the year for which such rents are claimed. Under Section 14 the ryot may, immediately after the service of notice, contest the validity of this demand by a suit without waiting for a claim at the enhanced rates being brought against him by the landlord.

Section 23, Clause 1 speaks of suits to obtain kubooleuts and pottahs, and to fix the rates at which the rents are to be paid. Section 76 enacts that when a ryot having a right of occupancy demands a pottah, and there is any difference regarding the terms, the Collector has to fix the rents and the term of the lease, which latter, however, in estates permanently settled, is not to exceed 10 years.

The expiry of the term does not necessarily terminate the tenancy of the ryot. The term fixed is the period during which the rent is to be paid at the rate mentioned in the pottah. When from any ryot, having a right of occupancy without any fixed rates of rent, a kubooleut is asked by the landlord, and a decree is given for the execution of the same, the terms of the deed as fixed by the Court cannot, speaking technically, be operative beyond a year. In the case, however, of a pottah being asked by such a ryot, the Collector can fix for it a period extending beyond a year, and during this term the landlord has no right to enhance upon any ground whatsoever. Perhaps the ryot also cannot sue during the existence of this term for an abatement except in cases of diluvion. It may, however, be observed here that the ryot has always the liberty of relinquishing his lease by giving notice at the end of the year after which (*see* Section 19) he intends to give up his lease.

Section 5 provides that, in case of disputes, the rents previously paid by a ryot having a right of occupancy without any fixed rates of rents are to be considered fair and equitable, unless the contrary be shown "in a suit under the provisions of the Act."

It follows from this that, in a case for enhancement under the second head of the second ground mentioned in Section 17, the landlord and the Court must assume the rents previously paid to be fair and equitable, and that the landlord, when he wants to disturb them, must proceed under the first ground for enhancement.

The right to ask for a kubooleut mentioned in Section 23, against the tenants and ryots independent of any enhanced rates of rents, is necessarily confined to caseswhere there is no written engagement or where, by operation of law or time, the former pottah has become cancelled, or, owing to a division of the estate, it has become necessary to ask for a kubooleut from the ryot who by his former engagements was bound to pay rents to other parties than the person now entitled to demand the same. Those who merely succeed to the former landlord, either by inheritance or as purchasers or assignees, have no right to ask for a fresh kubooleut.

The kubooleut may also be asked in cases of a permanent tenure, when it may have been originally given on condition of settling the amount of rents with reference to a measurement to be made at some future date, or with regard to the quantities to be cultivated within a certain period. In these cases the rates of rents are settled before, and the necessity for demanding kubooleuts through Courts arises afterwards from disputes regarding the quantity by measurement, or concerning the quality or the condition of the lands. In these cases, generally, a mere amulnamah is given at first, or some deed executed providing for the future exchange of the pottah and kubooleuts after a certain period. Even by the Sale Law of 1859, ryots having a right of occupancy (Section 37 of Act XI. of 1859) are not liable to pay any indefinite and unlimited amount that may be asked. It is, therefore, evident that, in all cases purely for kubooleuts, either the rates are fixed, or are simply required to be fixed by reference to some standard, viz., the nirikh of the Pergunnah, or the prevailing rates of the neighbourhood. No landlord can be allowed to ignore the provisions of Section 17 by simply asking for a kubooleut when his real intent is to ask an enhanced rate of rents. The landlord may, both when there was and when there was not a kubooleut before, ask for an enhanced rate under Section 17, and at the same time ask also for a kubooleut at the enhanced rate sued for by him, but that will not give him any right to ask for a general adjustment even of the old rents, and to pass over the restrictions imposed by Sections 17 and 13.

When, however, a kubooleut may be asked (irrespective of any right to enhance, if the case requires a settlement of the rates, they are to be fixed according to the prevailing rates of similar lands in the neighbourhood; and where the rates are already fixed, the amount of rent to be inserted in the kubooleut is to be summed up at that rate upon the quantity of the land which, after investigation, may be found to exist, or found to be liable to pay rents. It is therefore manifest that in ordinary cases for kubooleuts, and accordingly also in suits for pottahs, no question of enhancement or abatement can be allowed to be raised. If, however, when the value of the produce of the lands of his ryot may have risen, the landlord sues for a kubooleut fixing and determining the rates of rent to be paid by the tenant, he can ask only for a kubooleut, and the rents to be fixed must necessarily include the share of the enhanced value. If the rents in the neighbourhood have already adjusted themselves with reference to the altered state of things, the rents to be paid will be fixed with reference to those prevailing rates. If the rents have not so adjusted themselves, the rates prevailing before the rise in the value of the produce is first to be found out, then the share of the enhanced value is to be added to it, and the total of both will represent the proper rent.

If it be held that objection against the fairness of the old rates can be raised in all cases for kubooleuts and pottahs, the double process mentioned above must be adopted in these suits also.

The object of the law, however, appears to keep all cases under one right quite separate from others involving other rights.

In the present case, owing to a rise in the value of the produce upon the rents previously paid by the tenant, an enhancement is asked. It is, therefore, a case for enhancement, and not simply for a kubooleut, though a kubooleut is demanded by the plaint. It is true that a case for enhancement must be for the rents of *past* years, and in this case a kubooleut is asked for three years, and these are partly in future, still the fact of the insertion of this prayer cannot be allowed to alter the real merits of the claim. As the tenant had not given a kubooleut before, if the landlord had said "that the ryot has not given me a kubooleut, that I have offered him a pottah, that I want a kubooleut accordingly," and no mention had, on the ground of a rise in the value of the produce, been made of any right to ask for an enhanced rate (equal to that paid by the generality of ryots for similar lands before the rise in the value), it may have been a case for a kubooleut fixing the rents. The prayer to ask a kubooleut for three years is redundant, as no order fixing the rates for three years can be granted by the Court at the suit of the landlord. For a suit like this, where virtually an additional rent is asked upon the second ground mentioned in Section 17, issue of notice under Section 13 before the beginning of the year for which the enhanced rent is asked, is essentially necessary; but as no objection regarding the non-service of such a notice is taken by the tenant, it may be supposed that one was issued as required by the law. In all such cases the adjustment for one year is practically an adjustment for an indefinite period, viz., up to the time that any cause does not arise for a further enhancement or for abatement. Most of the ryots throughout Bengal hold without pottahs, and have seldom given kubooleuts; yet the rents payable by them are known to the parties concerned, and are evident from papers produced when disputes arise.

In the present case it is admitted that the value of the produce has risen without the agency of either the landlord or of the tenant, merely by a general rise in the value of the produce, owing either to an increase in the demand or a general rise in the price by a greater influx of gold in the country.

In order to find out what is the proper rent according to the rules laid down by political economists, we must find out, first, the average yield of a stated quantity, say a beegah. To find this, we have to ascertain the yield of the different crops from several separate and similar parcels of the land, at least in the year for which the enhanced rate is demanded, as well as for one or several years preceding that rise. We have then to find out the average value both of the increased and of the former products. This must be done by reference to sales made by more than one person of their several products during the two periods. We have afterwards, by a most tedious and complicate calculation, involving the consideration of numerous items, to fix the average costs of these products. In order to calculate this average of costs, we must not only find the value of several things, but also, by some arbitrary mode of calculation, the exact amount of those items that are necessary to produce the average of any particular produce per beegah. The calculation of all these averages must, therefore, for the sake of this average of costs, be made by taking into consideration the amount of lands likely to be cultivated by some limited standard, as a couple of bullocks and a plough. Now each ryot does not hold an equal quantity, or exactly sufficient for one or more ploughs. The necessary things must be purchased, and the bullocks fed even when the lands held by a ryot may not exactly be sufficient for one or more pairs of bullocks. The labors of the husbandman must be entirely devoted to the looking after his field, even if it be composed of beegahs less in number than the quantity fixed for one plough. It is quite clear that, owing to the difference in the quantities of land held by different ryots, the calculation of the general average by those rules and such standards cannot be expected to be fair and equitable to all the ryots. It may be favorable to some, and must be the contrary to others. The average quantity of the

seeds, of manure, or even of the labor per beegah, may not be open to the same objection. The exact quantity of these may be fairly discovered by a calculation on the principal of averages; but the calculation of the average of many other items must be wrong from the very nature of those items; and if those averages are defectively fixed, the result will tell against the correctness of the average of the increase in the value of the produce found by this process.

It is only after these perplexing, tedious, and almost impracticable calculations that an average of the increase per beegah can be found either in the price of the produce or the productive powers of the land In such a calculation, correctness is out of all question.

It was for this cause of impracticability of arriving in this country at any correct result, that Government, by Section 2, Regulation XIX. of 1833, modified that portion of Regulation VII. of 1822, which provided rules for assessment upon this principle of the calculation of averages. The cost of production being further under the control of the ryot, he cannot, when he is entitled to a deduction of them in any account fixing his rent, be expected to exercise any attempt to reduce these expenses by any device or discovery. He knows he will get these expenses deducted, and so does not care what they are in amount. Further, knowing that he is not to participate in any part of the increased profits, he, as a general rule, may rather be tempted to spend more than the sum he would have spent, if, induced by hope of participation in the profits, he might be led to adopt many measures of economy.

The calculation according to the rules of Political Economy may be adopted when the rents are not limited by any custom, and is adapted to a country where people, for want of opportunities for laying out their capital, look to the cultivation of land as means of realizing something for maintaining themselves and their families and for increasing their wealth. Agriculture here is no part of any commercial investment. When there is a rise in the value of the produce of lands, the same causes which have brought about this state of things must have raised the value of many other things likely to be required by the cultivator of the lands. Besides, the very produce of the fields is as much necessary to the ryot as to other people.

If the value of money has thus virtually diminished, it is quite apparent that if no more than the former amount of profits is given to the ryot, when an enhancement is to be made on account of the increased value of the produce, this amount will not now represent the exact value of the money originally reserved to the tenant. It may be said that one-half of a smaller sum may be a fair share of a tenant in one state of things, but the same portion out of a much larger amount might in another state of things not necessarily be so; but in answer to this it is to be kept in mind that when civilization and wealth increase, and are more diffused, many things which were luxuries before are sure to become necessaries even to the ryot and his family, and under such a state of things, he must now have a larger amount than he had before, unless it is intended that he is to be reduced to a state of comparatively greater wretchedness and destitution than he had the misfortune to be in before.

Generally speaking, the rise in the value of the produce is not the effect of expenses incurred by the landlords. In cases, however, of the rise of the productive powers of the soil, such expenses may have materially contributed to bring about the increased productive powers.

In Bengal an advance by a landlord to improve his estate is a thing unfortunately a mere contingency written in the books of laws, but not yet practically realized. Even in cases where the rise in the productive powers or the rise in the value of the produce may have been the effect of some expense by the landlord, the law does not appear to enact that the whole of the increase must be given to the landlord. It may fairly be supposed that in such cases the landlord, besides the old rent, is justly entitled to the market rate of inter-

est upon the capital laid out by him, and if anything still remains of the increased value, it is left to the Courts of Justice to determine what are the fair and equitable proportions in which this balance is to be divided between the tenant and the landlord. If in such cases the entire increased amount of profits is not awarded by law to the landlord, it must be clear that it was the intention of the law-makers to leave to the said landlord the entire increase, where the rise in the value is as much unconnected with him as with the tenant. The ryot as a party connected with the land has some right, irrespective of his former position, to receive some portion of this increase as the holder of the land, and the party who raises and sells the quantity of the produce which fetches the present higher value. Fair and equitable rates required to be fixed by a Court of Justice, and especially with reference to the known and established rights of tenants in the country, must mean something different from the highest rents which can be procured by putting up the farming of the lands to competition. The simplicity of the rule of proportion, its pliability to be adapted in many other cases than the one now before us, and the fact of its not being opposed to the principles which appear to have generally guided the fixing of rents throughout the country, have induced me to adopt it.

It cannot be said that the law has said in so many words that this rule of proportion should be observed. In adopting the rule of proportion, we are not obliged to make any difficult enquiries. The old rent is always shown, and the particulars of the increase itself must be supplied by the landlord to start his case. He proves that a maund of a certain produce of the land fetched one rupee before, but that since so many years, the price increasing, it now fetches from such a time Rs. 2 per maund. The value of agricultural produce is a thing almost within the personal knowledge of the generality of the villagers, and there are various satisfactory records showing what it was for several years past. We have but to find out the average produce of the present time. The quantity of the produce in all such cases of enhancement upon the ground of the increase in value is assumed, on both sides, to have been the same before as it is at present.

The landlord is not likely to be a loser when he gets his rents in the same proportion that he got them before, and the ryot cannot, in any way, be said to encroach upon the rights of his zemindar when he is allowed to retain (for his costs and his share of the profits) only the share that he received before. It is quite within the power of the tenant to give satisfactory evidence of the quantity produced. The value of this quantity according to the old price being easily calculated, we discover by calculation the proportion that the former rent bore to the amount of that value, and by subtracting this value from the amount found by calculation to represent the present value, we at once find the amount of the increase in the value. Then we have to give to the landlord out of the present value the same proportion which his former rent bore to the former value. It was within the power of the landlord to have raised the former rents before the increase, if the former rates were from any cause lower than those paid by others of the same class in the vicinity for similar lands. When further increase of value takes place from time to time, the adjustment on the rule of proportion will not become the less fair and equitable, because in amount a larger sum is left to the ryot. His gains relatively and proportionately with those of his landlord have not risen, though, as compared with his former share, the amount of the present share may appear to be larger. This rule of proportion is not likely on the ground of the calculation being made on the gross, and not on the net value of the produce, to be injurious to the landlord. It is not likely to be so to the tenant, except when the rise in the costs of production may *exceed* the proportionate rise in the value of the produce. This is not, however, likely to happen at all. It is not only an extreme and improbable, but almost an impossible case. If it can be supposed that a rise in the value of the produce, much beneath the proportion

of the rise in the costs of production, or a rise in the first without any rise in the other, are cases any way possible, leave may be granted in any of these cases to the ryot or the landlord, as the case may be, to make special application to the effect that the proportion of the profits for him of the increased valuation should be divided with reference to the value of the net, and not the gross produce.

Mr. Justice Seton-Karr.—After ample time for consideration, I concur in the answer which it is proposed to send to the Division Court. That answer is contained in the elaborate and clear judgment of Mr. Justice Trevor, which seems to me conclusively to establish the following points, and that, by a reference to the whole course of legislation on this important subject, from 1793 downwards, as well as to facts disclosed by Indian History.

1. Neither by Hindu, by Mahomedan, or by Regulation Law, was any absolute right of property in land vested in the zemindar to the exclusion of all other rights; nor was any absolute estate, as we understand the same in England, created in favor of that class of persons. The ryot has by custom, as well as by law, what we may term a "beneficial interest in the soil."

2. The Decennial Settlement, while enhancing the status and fixing the rights of the zemindars, did not intend to alter, and did not alter, the Common Law of the country, with regard to ryotty tenures; khood-kasht ryots, whose tenures commenced at, or subsequently to the Decennial Settlement, were still entitled to hold such tenures either at the Pergunnah rates, or, what is the same thing, at rates payable for lands of a similar description in the neighbourhood.

3. Pergunnah or local rates are perfectly capable of ascertainment.

4. Such ryotty tenures and rights being in existence all over the country, though not very well defined, Act X. of 1859 fixed twelve years to be the limit after which the right of occupancy of an ordinary resident, permanent, or khood-kasht ryot, could not be questioned, and conferred the same right of occupancy on other ryots, who formerly and without that enactment might, perhaps, not have been entitled to the same by the common usage and custom of the country.

These points appear to me to have been set out in the judgment I allude to, at such length, and to be supported by such arguments, reasons, and authorities, that it is not necessary for me to attempt to go over the same ground again. The same views are further established by the judgment which Mr. Justice Campbell has written at considerable length and with great force. I have therefore only to add some remarks on the three several principles, according to which it has been suggested for the one side or the other that rent ought to be enhanced by zemindars, and that Courts of Law ought to decree enhancement.

The first is the principle of competition. At the time when the rent question was argued before the whole Court at great length and with consummate ability on both sides, one of the learned Counsel, as I understood him, expressly abandoned the theory of competition, although Mr. Doyne did contend for the adoption and soundness of this principle. But I do not understand that any one of my learned colleagues looks with favor on this proposal either as warranted by the law and custom of the country, or as even calculated to effect a settlement of the rent difficulties. On the legal aspect of the principle, it must be conceded that it is one applicable to English landlords and English tenants, and that it has been with them adopted as the feudal system passed away, from the consideration that an English land-owner has now a complete, and absolute right in his land, and can deal with the same as he would deal with any other article or chattel over which he has entire and uncontrolled dominion. Still, not to say that rents by custom, such as quit-rents and fee-farms, do exist in some parts of Great Britain, and that even there, competition, though general, is not absolutely universal, this said principle of competition is, I do not hesitate to say, hitherto, practically and as a general rule, unknown in India. We find no trace of

it in the works of Hindu or Mahomedan writers. It is never expressly sanctioned, contemplated, or even implied by any Section of all the Regulations of Lord Cornwallis. It is abhorrent to the temperament, social habits, and attachment to the soil which distinguish the agriculturists of India to an extent unequalled by the agriculturists of any European Kingdom. If one or two instances can now be cited where zemindars, in the neighbourhood of Calcutta or in some of the Metropolitan districts, have put up lands which have come into their own actual possession by death or desertion to competition, such partial exceptions will only be a more convincing proof that ordinary rents all over the country were and are still regulated, not by competition, but by some other principle. Indeed, if the word competition deserves to be applied at all to any dealings in respect of land, the term must mean, in India, competition by zemindars for ryots, and not by ryots for lands. I can perfectly understand that a legislator might think a system under which England has attained such an eminent degree of agricultural prosperity and advancement, to be a system which will benefit all countries and peoples, and that he might wish to introduce the same into the provinces of India. I say that I can perfectly understand the feeling which would prompt such a course of policy, though I might doubt the expediency of the measure when I considered the opposite customs, in respect to the cultivation of lands and the collection of rents, which had long been recognised and acted on; the traditions which are consecrated by ages; and the vast and almost irreconcilable differences of character and feeling between the European and the Asiatic races as dwellers in rural villages, and as tillers of the soil. But, under the peculiar circumstances of this country, we have, as Judges, to carry out the law with regard, not to what we might think the best possible scheme for improving the various processes to agriculture, and for enabling men, fast to amass, and then to distribute wealth, but with regard to the wording and spirit of the law itself, and also with regard to the customs and habits of the people, where the Statute law is silent; and we are bound to take care that we do not sanction or introduce strange principles in the settlement of what is admitted to be a vexed and difficult question, left designedly for the Courts of Law to settle as they best may. Finding therefore no trace of rents by competition either in the laws of 1793, or in the Act for the settlement of all questions between landholders and ryots known as Act X. of 1859, or in those customs and peculiarities which make up the Common Law of the country, and without which all Statute Laws are mere pieces of parchment, bearing indeed the stamp of the Legislature, but without vitality or effect, I am clearly of opinion, and so, I understand, are all my learned colleagues without exception, that whatever rule may be taken to guide Law Courts in future in the enhancement of rents, that rule must and cannot be competition.

Next, we come to the second principle proposed or suggested for our acceptance, as well as for the guidance of the Subordinate Courts. And this I understand to be as follows:—

In cases where rent is sought to be enhanced by reason of an increase in the value of the produce owing to a general rise of prices, and independent of the agency either of zemindar or ryot, the old rent is to be taken as the basis, but the whole of the profit, less the increase in the cost of production, is to be taken by or decreed to the zemindar.

I have very fully considered this proposal, but must own that I am unable to find any one sound principle by which it could be supported, or any countenance for it either in the previous history of the rent difficulty, or in the wording of Act X. of 1859, or lastly in the intention of the Legislature which enacted that law. In truth, it seems to me even less capable of support than the theory of rents by competition. Competition, if the laws were not pointedly opposed to that view of the subject, and if we had no clue to the policy of the Hindu, the Mahomedan, or the British Government in former days,

might be plausibly and fairly supported by arguments to the effect that this principle was the best when the laws were silent on the subject: that accumulation of capital was admittedly productive of great advantage to all countries: that there is no improvement to be looked for in agriculture from petty agriculturists or mere cultivators, or unless wealth and means be massed in the hands of one individual: that only individuals possessed of such means and vested also with the exclusive dominion over the soil and with power to eject ryots and cancel leases, can benefit the general population: and that a system which has worked such wonders in Great Britain must imperatively produce the same effect in India, or wherever it is fairly and fully tried. But the theory of the old rent as the basis (for it is not denied that there must be some existing basis on which to decree an enhancement) *plus* the increased value of the produce as the superstructure, cannot be supported by any such reasoning. If we still keep the old rent and add to it, we are dealing with what was notoriously fixed by the ancient custom of the country—that is, with cases in which landlord and tenant came to an understanding that they were to share in the profits of the soil without any thought of competition or rack-rent, and under an implied agreement and custom that if the ryot would take the land for so much, or would continue to live on and cultivate his father's holding, he should not be ejected so long as he paid his rent. We thus commence with a customary rent, and it seems to me therefore that enhancement ought to be decreed on somewhat the same principles as those by which the rent was originally fixed, *viz.*, by custom, unless the law has laid down some other principle as our guide. Now, on what principle, derived either from the Statute Law, or the Common Law, is the whole of the increase, deducting the cost of production, to be handed over to the zemindar? It cannot be on the presumption that the ryot originally received from the land what was just sufficient to repay him for his toil, to keep alive his cattle, and to allow him seed sufficient for the next year's harvest. This, we have seen, was not the principle on which rents were fixed either before or after the Perpetual Settlement between the zemindar and the ryots. Neither can it be on the special proviso that the zemindar has done anything to improve the land, for the law applicable to the very case which we are considering, expressly states that we are to provide for suits in which the increase is not owing to the agency either of the zemindar or of the ryot. Neither, again, can the proposed rule rest on any general argument drawn from the part which the zemindar takes in directing and aiding the agricultural operations of the cultivator. The zemindar, it is perfectly notorious, takes no part in controlling or assisting the various processes of agriculture, for I do not consider the advance of Tuccavee for seed, made occasionally in frontier or jungly districts, as anything but partial exceptions not to be taken into account. He bears none of the risk. He supplies none of the capital. He makes no contribution to the ryot's stock, and he is never anywhere charged with the erection or the repairs of the ryot's houses, which do not belong to, and are never claimed by, him, but which are invariably removed by the ryot, when he changes his residence to some other village. Nothing, then, which can be discovered in the familiar and social relations between the zemindar and the ryot would seem to authorize us to say that, when the value of produce increases by the sheer growth of the country in prosperity, by the introduction and extension of Railways, by the rise in prices, by the general security of property, and by the gradual expansion of civilisation, the ryot is to get nothing, and the zemindar is to take everything. That a reasonable share of the increase is to fall to the zemindar on account of his increased expenses and his unquestioned position and rights, is admitted, so as to make the division fair and equitable; but it must be so to both parties. And this requisition will be hardly satisfied by deducting in the ryot's favor the mere increase of the

cost of production. In many cases this may be much less than the increase in the value of the produce. And in all cases it will not amount to a recognition of the rights and position of the ryot.

Can we, then, find any grounds for such a rule in the actual wording or in the presumed intent of the law? Surely, as far as mere words are concerned, we cannot. Had the Statute been intended thus to solve all our difficulties, nothing would have been more simple than to add a Section to that effect. Instead of any such plain direction, we have the words "fair and equitable rates." But what of fairness or of equity, it may be asked, can there be discerned in a system which would take away all the advantages of an increase, when there is an increase, from one person who bears the labor of cultivation, the risk of the seasons, and the chances of the market, and would make over the same to another person who has no such burden and no such chances to bear? It may be a source of regret that the law did not lay down some more precise rule or formula than the words "fair and equitable rates," or even that the Courts of Justice are at all made the vehicle of expounding the law in the matter; but, as we are bound to consider and decide the point, I do not see how we can give everything to the zemindar, if we pay due attention to the ordinary meaning and import of language.

So much, then, for the language of the law. Then can we, admitting the want of precision in the language of the Section, support the above principle on what we may conceive to have been the intention of the Legislature? Now, the intent and scope of Act X. of 1859 was much canvassed before and at the time of its passing. The Legislature avowedly came forward to fulfil the pledges of the Legislature of 1793, to repair its own unfortunate omissions, to supply what, owing to the neglect and apathy of the zemindars, had not been conferred on the ryot, and to place the whole of the relations between the two parties on a more satisfactory and equitable footing — on a footing which should raise and elevate the ryot, while it in no way impaired those substantial rights which Lord Cornwallis had guaranteed to, or had conferred on, the native gentry of Bengal. Some of the men who passed that well-known Statute were men of intimate knowledge of the Revenue Laws, and of the habits of the people, and all were men distinguished by philanthropy, and by active sympathies for the general well-being of the people. Did they, then, deliberately sit down to enact a law which, on one of the most constant and fertile sources of dispute and disagreement, laid it down that the ryot, for whose interest the law was passed, was to derive no benefit from the general good government and increased prosperity of the country, and that the zemindar, to whose neglect the law was in part owing, should derive all the benefit? I cannot gather from the debates that such was their intention, nor can I think any such ruling as that proposed for our acceptance would have received their sanction, or would have been consistent with their notions of what is "fair and equitable." We must constantly bear in mind that we are now sitting to carry out their intentions, and to apply, practically, in the contests between both parties, a rule which is to have equity and fairness to both for its base. Now, if the rent of the zemindar rises, without any effort on his part, in the proportion and scale on which it was originally fixed by the custom of the country and the consent of both parties, I do not think that it can be said that it does not rise in fairness and equity as far as he is concerned.

It follows, then, that I can discover nothing to support this second principle of enhancing rents, either in the consistency and plausibility of the theory itself, or in the Common Law of the country, or in the relations in which the zemindar stands to the agriculturist, or in the positive language and wording of the enactment, or in the supposed intentions by which the Members of the Legislature were actuated at the time. I must therefore reject the same as not implied or recognised by the customs of the country, and as not warranted by the laws of the State.

In fact, this principle can be adopted only on the theroy that no ryots, no

ordinary resident cultivators, none, in fact, except khood-kasht kudeemee ryots, or ryots who can prove their existence as far back as the Decennial Settlement, have any rights of occupancy, or had any, until Act X. conferred the same on them by its celebrated Section 6. But the lengthy arguments in the case, and Mr. Justice Trevor's judgment, as well as Mr. Campbell's, and those of my colleagues which I have for the first time heard to-day, have clearly shown and have satisfied me that such is not the case, and indeed the theory with which I am dealing can only be supported by holding that the ordinary khood-kasht ryot who came into existence after 1793, in the spread of agriculture which marked the British Rule, is a mere tiller of the ground, who has no permanent connection with or beneficial interest in the soil: that evictions and ejectments have been, not only occasionally avowed in legislative theory, but have been largely resorted to in practice: that between 1793 and 1859 the whole Common Law of the country has been obliterated, and the feelings and customs of the population from the highest to the lowest have been completely revolutionized: and that the right of occupancy given by Section 6 allows no ryot, except the class of kudeemee khood-kasht, anything but the preferential right to squat, and to accept, if not a mere rack-rent, at least a rent which practically excludes him from all participation in the surrounding prosperity of the country, and reduces him to a dead and uniform level of risk and hard work, for the pure benefit of the zemindar, without any prospect of amelioration or increase of his own.

Not to go over the same ground of the Regulations and Acts unnecessarily, it may be stated with confidence that the reverse of all the above considerations is the case. Khood-kasht or resident ryots from father to son were always considered to have a right to remain on the land so long as they paid their rent. Customary rates and Pergunnah rates recur again and again in our legislation. The zemindar with all his powers and rights, large as they no doubt are, is not an absolute landholder. The ryot has an interest in the land much beyond that of a mere day-laborer or of a person entitled to the wages and the enhanced cost of production. The Regulations and Acts, extending over a period of years, universally appeal to precedent, and nowhere actually annul or obliterate the solemn pledges of 1793.

Possibly, the Legislature, in seeking to repair neglect and omission, may have extended the privileges of occupancy at fair and equitable rates, to classes who otherwise would not have obtained it had things been left to themselves. Pykasht tenants, and even mere squatters, may now, after 12 years, unless the zemindar be vigilant, claim rights of occupancy, which the Courts, interpreting Act X. of 1859, may be compelled to uphold in their favor. But we are not dealing with such a case in this instance, nor have the generality of the cases that have come before the Court been of this kind. In nearly all cases, rights of 20 and 30 years have been pleaded. In any view, we are to administer and not to alter the law, and we cannot take into our consideration any particulars in which legislation perhaps went beyond that which popular custom and general practice would have warranted.

Finding, then, the second theory to require for its support a state of things other than exists and other than the Legislature has all along recognized, I come to the last rule, the rule of proportion.

No *via quarta* is proposed, or even hinted at, for our acceptance. This rule of proportion, it seems to me, will combine many of the requisites for which we ought judicially to look, in laying down general principles, on which zemindars can make, and Courts can enforce, claims. It will proceed from the basis of ancient, recognized, and universal custom, and it will adapt that ancient custom to a new, a higher, and an improved state of things. It will be in strict conformity to what I understand to be the intention of the Legislature, and to what I think is a just interpretation of the words of Act X. It will depend on evidence, which, in most cases, will be ascertainable without extra-

ordinary difficulty, *viz.*, evidence as to what is the present price of various kinds of produce compared with the price of the same articles some ten, or twenty, or thirty years ago. I believe that materials do exist for this enquiry, and that there are men in every Haut, Gunge, or Bazar in the country, who will supply such information. By eliminating all the cost of production, one additional source of confusion and intricacy will be removed, and all minute and almost impracticable enquiries into wages, stock, profits, and the like, will be saved. Then, as regards the zemindars, it seems to me that such a plan will be equally "fair and equitable" to him. Without an additional anna of expenditure, without any increase of risk, or any new share of contingencies, he will be able to raise his rents, not merely to the level of local or Pergunnah rates, but generally all over his zemindary, in proportion to his own naturally increasing expenses, and to the more substantial wealth and prosperity of the ryots of his estate. He will share, like others, in the advantages, as well as in the disadvantages, of a general rise of prices. There are no doubt cases in which it may be difficult to ascertain the old rates at which rents were fixed; and there may be others to which the proposed rule will not apply at all. In regard to the latter, Mr. Justice Trevor's judgment leaves the point open; and in regard to the former, all we can say is that there is no rule that the wit of man can devise under the present state of the law, which may not be difficult of application on some occasions, or may not work hardship or apparent injustice on others. The worst that can be adduced against the proposed rule is that it may be unequal, difficult of application, or uncertain in effect. But what is certain, and the only thing that is certain at present, is, that the rule in the case of Ishur Ghose has not only not furnished other zemindars and the subordinate Courts with an useful and available precedent, but that after all the time, the toil, and the great learning that has been expended on that case, we are not told that it has even settled the question finally between the actual parties to the suit.

After this, I think we can have little hesitation in adopting the rule of proportion as our guide. There is, in fact, no other resource left. Other modes of adjustment have been successively cut away from under our feet, by a preponderance of argument, or by the sure test of experience. I admit that the Courts of this country are placed in this matter in a position which, it is not too much to say, resembles that of no other Courts in the world. If the principle of competition be anywhere fully established, the rents of lands are settled on the well-known maxims of Political Economy, demand and supply, and Law Courts have very little, if anything, to do with the decision of such questions. If the Legislature had laid down a distinct and detailed principle for regulating enhancement, then Courts would only have to apply that principle, as they would any other. But with us competition is a mere theory, and the law has failed to lay down a principle, except in vague and general language. We must remember, however, that zemindars have been accustomed to bring their cases of enhancement and of rents into our Courts from the earliest period of our rule, and that this system, which forces them into Courts, and which thus contradicts all assumption of absolute and unqualified rights on their part, is no strange or novel system to them.

We must, then, do the best in our power, and by a resort to past custom, as well as by a consideration of the present circumstances of the time and country, and of the intent and language of the law, we must endeavour to discover some rule which shall not be too cumbrous for the machinery at our disposal to work, which shall prove itself to be of general but not perhaps universal adaptation, which shall carry out the intentions of the Legislature, which shall be neither too much in advance nor too much behind the feelings of the age, and which shall be fair to the ryot, while it is not inequitable to the zemindar.

The rule of proportion, as far as I can judge at present, seems to me to combine all these requisites; and, in any view of the case, to come closer to the mark and to interpret the enactment better, than any other rule which has either been discussed in theory, or been tried in practice.

I would therefore transmit to the Division Court, and as a consequence to all the subordinate Courts, the answer proposed by Mr. Justice Trevor, with which answer I hereby intimate my entire concurrence, so that the various classes of subordinate Judges may know in what particular decision they are to find the law of the majority of the Court. In support of that judgment, and with regard to the principles laid before us, I have thought it expedient separately to record my own reasons. I may add, after this consideration of the case judicially, that, without any extravagant expectations that such a ruling will dispose of all the difficulties as to rents all over the Lower Provinces, I entertain a hope that it will go some way to decide matters, that it will be capable of adaptation to the general circumstances of the country, that it will tend to bring the interests of both parties closer together, and that it will be welcomed as a relief by the ryots, and perhaps even as a boon by some of the zemindars.

Note.—I append a List of the Laws, the Cases, and the Books, quoted in the course of argument in this lengthy and important case.

Regulations I. and II. of 1793.
" VIII. of ditto, Section 6, Clause 2; Sections 51, 55, 56, and 66.
Regulation XIX. of ditto.
" XLIV. of ditto, Section 5.
" IV. of 1794.
" L. and LI. of 1795, Section 10.
" VII. of 1799, Section 29.
" LVII. of 1803.
" V. of 1812, Sections 6 and 7.
" IV. of 1805, Section 7.
" VII. of 1819.
" V. of 1816.
" XI. of 1822, Section 32.
Act XII. of 1841, Section 28.
" I. of 1845, Section 26.
" X. of 1859, Sections 3, 4, 5, 6, 13, 17.
Harington's Analysis, Vol. II., pages 183-188.
Harington's Analysis, Vol. III., pages 228, 231, 233, 235, 369, 423, 436, 460, and 481.
Minute of Lord Cornwallis, 3rd February 1790.
Despatch of Court of Directors, 19th September 1792.
Fifth Report, 1812, pages 16, 19, 20, 60, 206, 478, and para. 370.
S. D. A. Reports, 1855, 11th July, page 357; 1856, 16th May, page 443.
Marshall's Reports, 11th November 1862, page 379.
Weekly Reporter (Sutherland), 1864, May 14th, September 14th, November 26th and December 22nd.

Mr. Justice Kemp.—As considerable difference of opinion exists as to the principles upon which suits for enhancement of rent brought by a landlord against a ryot having a right of occupancy, on the ground that the value of the produce has increased otherwise than by the agency or at the expense of the ryot, are to be determined, and as there appear to be conflicting decisions upon the subject, the question has been referred for the decision of a Bench consisting of all the Judges of this Court.

A preliminary question was raised and argued with reference to the wording of Section 6, Act X. of 1859, whether the Section is to be construed retrospectively or prospectively.

The Section runs thus: "Every ryot who has cultivated or held land for a period of 12 years has a right of occupancy in the land so cultivated or held by him, whether it be held under a pottah or not, so long as he pays the rent payable on account of the same, but this rule does not apply to khamar, neej jote, or seer land belonging to the proprietor of the estate or tenure, and let by him on lease for a term or year by year, nor (as respects the actual cultivator) to lands sub-let for a term or year by year, by a ryot having a right of occupancy. The holding of the father or other person from whom a ryot inherits, shall be deemed to be the holding of the ryot within the meaning of this Section."

On this point I give my opinion with much diffidence. I would observe that, though it is generally true that a Statute shall not be so construed as to operate retrospectively, still if the words are plain and manifest, and can have no meaning

unless such a construction be adopted, the Court is bound to give effect to them notwithstanding any particular hardship, inconvenience, or deteriment which may be thereby occasioned. It appears to me that the words used by the Legislature in the said Section will admit of no other reasonable interpretation than that the Legislature intended them to be construed retrospectively.

As to the principle upon which suits for enhancement of rent against a ryot with a right of occupancy are to be determined, I am of opinion that the jumma hitherto paid by the tenant must be presumed to be fair and equitable, and that it cannot be enhanced unless the landlord upon whom the *onus* lies can prove that, under some one of the grounds laid down in Section 17 of Act X. of 1859, the jumma is liable to enhancement.

Much has been said in the course of this protracted argument on the subject of the *status* of the ryot prior to the enactment of Act X. of 1859. It has been contended by the learned Counsel for the zemindars that, previous to the aforesaid enactment, the only ryots who had any rigths of occupancy at all were the kudeemee khood-kasht ryots, or their descendants; and that, with the exception of tenants of that class, all other tenants whose tenures were either created at some time subsequent to the Perpetual Settlement, as well as those who, to use the words of the learned Counsel, Mr. Doyne, are the mere creatures of Act X., are mere tenants-at-will, liable to ejectment at the caprice of the zemindar, unless they pay the highest rate of rent which can be obtained by competition. On the other hand, it was argued by the pleader for the ryots, Baboo Dwarkanath Mitter, who conducted their case with very great ability, that both previous to and subsequent to the Perpetual Settlement, indeed up to the passing of Act X., no ryot of any description or class could be ejected as long as he paid his rent according to the Pergunnah rates, or, in the absence of such rates, according to customary and prevailing rates.

It appears to me to be unnecessary to record an opinion at any length upon the vexed question of the rights and *status* of the ryot at the time of the Perpetual Settlement and subsequent thereto up to the passing of Act X. of 1859, inasmuch as that enactment has definitely declared what the rights of the ryots are. I shall content myself with briefly stating that, in my opinion, prior to the Perpetual Settlement, the zemindars possessed no absolute or proprietary title in the soil, that such title was for the first time and gratuitously vested in them by the British Government. The name of zemindar was wholly unknown to the Hindoos, and was borrowed, together with the office, from Mahomedan institutions. During the Hindoo Administration, the ryot was the real proprietor of the soil; cultivated land, says the text of Menu, "is the property of him who first cleared and tilled it."

The zemindars under the Mahomedan Government were mere contractors, collectors, or farmers of the revenue, receiving a percentage for their trouble and responsibility, and small grants of land in the shape of nankar or chakeran for their subsistence. I am further of opinion that the settlement was originally made with the ryots, the Sovereign receiving a portion of the crop either in kind or in money, and the ryot the remainder; what this portion was is variously stated by different authorities, but this much is abundantly clear, that the "asul jummabundee" was based upon a rule of proportion and on custom, and not fixed by competition, and that as long as the ryot paid the assessment fixed, or was willing to do so, he was not liable to ejectment.

When the proprietary title in the soil was vested in the zemindars by the British Government, the rights of the ryots were expressly reserved, and the framers of the Perpetual Settlement distinctly intimated to the zemindars that the Government reserved to itself the power of enacting such Regulations as it might deem necessary and proper for the protection of the ryots and other cultivators of the soil, and that no zemindar or other actual pro-

prietor of the land would be entitled on that account to make any objection to the fixed assessment which they had respectively agreed to pay. (See Clause 1, Section 8, Regulation I. of 1793.)

The Hon'ble Court of Directors, in their Minute conveying their sanction to the Permanent Settlement with the zemindars, remarked — "We expressly reserve the right, which clearly belongs to us as Sovereigns, of *interposing* our authority in making from time to time all such regulations as may be necessary to prevent the ryots being improperly *disturbed* in their *possession*, or loaded with unwarrantable exactions, such interposition being clearly consistent with the practice of the Mogul Government, under which it appeared to be a general maxim that the *immediate cultivator of the soil duly paying his rent should not be dispossessed of the land which he occupies.*" (See page 189, Volume II., Harington's Analysis.)

In the Minute recorded by the Marquis of Cornwallis on the 3rd of February 1790, His Lordship observed "that every beegah of land cultivated by the ryots must have been cultivated by an express or implied engagement, that a certain sum should be paid for each beegah and no more, and that the rents of an estate can only be raised by inducing the ryots to cultivate the more valuable articles of produce, or by clearing the extensive tracts of waste land which are to be found in almost every zemindaree in Bengal." In another part of the same Minute are the following remarks: "Neither is the privilege which the ryots in many parts of Bengal enjoy of holding possession of the spots of land which they cultivate, so long as they pay the revenue assessed upon them, by any means incompatible with the rights of the zemindars. Whoever cultivates the land, the zemindar can receive *no more* than the *established rent* which in most places is fully equal to what the cultivator can afford to pay. To permit him to dispossess one cultivator for the sole purpose of giving the land to another, would be vesting him with a power to commit the wanton act of oppression from which he would derive no benefit."

From these remarks, it appears to me clear that His Lordship was sensible that the ryots had rights, and that their rents were fixed upon some established and customary principle.

All the old Regulations from 1793 to 1812 speak of Pergunnah rates as fixed by custom and not by competition, and Section 7, Regulation IV. of 1794, enacts that "no proprietor of land shall require ryots to take out pottahs at higher rates than the established rates of the Pergunnah for the same quality and description of land, but that ryots shall be entitled to have such pottahs renewed at the established rates."

The old Sale Laws make clear mention of the established rates; and it was only in 1822 by Regulation XI. of that year that even an auction-purchaser at a sale for arrears of the Government revenue could eject occupant ryots, and this power of ejectment was taken away from them in the case of ryots with rights of occupancy by Act XI. of 1859.

To come to Act X. — and by this Act alone all suits for enhancement of rent must be determined — we find three classes of ryots defined—

1st.—Those who are protected from enhancement under Sections 3 and 4.

2nd.—Those who have rights of occupancy as declared in Section 6, and whose rent is not liable to enhancement as a rule, but only on certain grounds and circumstances which must be strictly proved by the zemindar, and

3rd.—Tenants who have no right of occupancy, and who may therefore be said to be tenants-at-will.

In the present instance, we are dealing with the cases of ryots coming under the second class.

Admitting, then, that the zemindar has established a ground for enhancement, *viz.*, that the value of the produce has increased otherwise than by the agency or at the expense of the ryot, on what principle is the rent to be enhanced?

Mr. Justice Campbell has very clearly shown in his judgment referring these cases that there is no fixed rule for the guidance of the Lower Courts. Each

Court proceeds upon some arbitrary rule of its own, and even the same Court is not guided by one uniform rule, though the claim to enhance may be made on one and the very same ground. It is, therefore, clearly a matter of vital importance to the prosperity of the whole agricultural community that some fixed and certain rule should be established. Anything is better than the present system of doubt and confusion.

Three propositions have been submitted for our consideration.

1st.—That a ryot who has acquired a right of occupancy under Section 6 has no preference over a third party who has not acquired such right, beyond that of not being liable to ejectment as long as he consents to pay the highest market or competitive rate.

2nd.—That all increase in the value of the produce, after deducting any increase in the expenses of cultivation, which include a fair and equitable rate of wages, interest on stock, &c., is the sole right of the zemindar, and must be added to the old rent, the whole forming the rent payable to the zemindar.

3rd.—That the increased rent should bear to the old rent the same proportion as the former value of the soil bears to its present value.

The first proposition has my unqualified disapproval. It is neither fair nor equitable. It deprives the occupancy-ryot of every privilege which Act X. has vested in him, and relegates him to the position of a mere hired laborer, without a hope or prospect of any amelioration of his wretched condition. The rights of the ryots, though they may have been in abeyance for nearly a century, have never been lost to them; the hope of their recognition has been too long deferred, but those rights have at length been conceded to them by Act X. The Select Committee who sat on the Bill—Act X.—remarked that the "recognition of a right of occupancy in the ryot necessarily implies some limit to the discretion of the landlord in adjusting the rent of the person possessing such a right." If the ryot with a right of occupancy is liable to ejectment, unless he pays the highest rate of rent that can be obtained by competition, his position is much the same as a tenant-at-will, and the declaration that he has rights of occupancy appears to me to be a mere mockery.

The second proposition is also, in my opinion, neither fair nor equitable. The orginal adjustment of the rent was made according to customary rates, and the rent payable by the tenant was not rent proper in the sense used by political economists. The zemindar spends no money in improving the land—he takes no risks upon himself of drought, inundation, loss of crops, &c. On what principle of equity and fairness can he claim the whole increase in the value of the crop? Are the ryots to benefit in no degree by a rise in the price of agricultural produce, though they run all the risk?

The third proposition appears to me to come up to the standard of what is fair and equitable to both parties. The theory is one of easy application; it is uniform in its operation; it is one that adapts itself to the simple understanding of the ryot, and is not as far as I can judge, productive of loss to any party, inasmuch as the rise in the value of the produce and the rise in the rent proceed *pari passu*. All intricate and vexatious enquiries and details, of which both parties are impatient, are rendered unnecessary by its adoption; and as no better rule suggests itself to me, I cannot but give it my unqualified approval. It is, of course, very difficult to lay down a general rule which shall meet the varied circumstances under which suits for enhancement of rent may be brought; and in assuming the proposed rule as the best adapted for all but exceptional cases, I wish it to be understood that in cases where a special contract exists, binding the parties to other proportions, the rule will not be applied.

Mr. Justice Morgan.—The suit which is before the Division Court in special appeal is a suit by the plaintiff, a purchaser of an estate sold by auction for arrears of Government revenue against the defendant, a ryot, who has gained a right of occupancy under the 6th Section of Act X. of 1859. In form it is a suit for a

kubooleut, but the substantial issue between the parties is admitted to be whether the defendant's rent can be enhanced and at what rate, the value of the produce of the land having increased. The question which has been asked of us by the Division Court, and the only question which, I conceive, it is competent to us authoritatively to answer on this occasion, relates to the principle which the Court should lay down for the guidance of the Deputy Collector on the trial of the suit which is to be remanded to him. Many other questions may arise in the suit, and some have been discussed here, which, I think, it needless to consider, beyond remarking with reference to one of the latter that in my opinion the appropriate form of suit in a case like the present is a suit for enhancement brought after due service of a notice specifying the grounds on which an enhancement of rent is claimed, according to the provisions of the 13th Section of Act X. of 1859.

The only rule of decision which the Legislature has provided to guide the Courts in enhancing the rents of ryots having rights of occupancy, but not holding at fixed rates of rents, is that contained in the 6th Section. Such ryots "are entitled to receive pottahs at fair and equitable rates." These indefinite words have, as may well be supposed, received various constructions. In the Courts below, it appears from the case now before us that three widely different interpretations have been given to them: 1st, that the rent should be increased in proportion to the net increase in the value of the produce; 2nd, that the increased rent should be what upon open competition may be obtained as rent; 3rd, that the increase in value should be equally divided between zemindar and ryot. And of this last interpretation, again, it is said by one learned Judge that the principle of dividing the increase equally may in many cases be roughly equitable, while by another the principle is said to be in fact no principle at all, and to be established on no fair and equitable basis.

In this Court there have been two conflicting decisions which have caused the present case to be referred to the Full Court.

According to the first of these decisions (Hills *vs.* Ishur Ghose) the Court recognized the principle of competition as the mode of ascertaining the fair and equitable rate of rent. In the Chief Justice's judgment disposing of the application for a review, it is said, with reference to the terms of the 5th Section which have been quoted: "This, in my opinion, gave the ryot no greater right than would be created by a covenant in a lease to renew it at a fair and equitable rent. To be fair and equitable, it must be fair and equitable so far as both parties are concerned, not fair and equitable as regards the ryot, and unfair and inequitable as regards the proprietor of the land; and it would not be fair and equitable to a landowner to fix the rent at a lower rate than he could obtain from a new tenant, if he had not been deprived by the Act of the Legislature of his power of determining the tenancy and re-letting the land to a new tenant."

According to the later decision (Shib Narain Ghose *vs.* Kashee Proshaud Mookerjee and others), the rent paid in adjacent places by ryots of the same class for land of equal fertility will show the fair and equitable rate; or if rents in the neighbourhood have not adjusted themselves to the altered circumstances of the lands, then the adjustment must be "according to the method of proportion, that is, the increased rent must bear to the old rent the same proportion as the former value of the produce of the soil bears to its present value."

I agree with the majority of the Court in holding that the first of these two decisions is erroneous. Whatever may be the fair and equitable mode of adjusting the rent between a zemindar and ryot having a right of occupancy under the Act, I think that it was not intended by the Legislature, and that it is not the true meaning of the words they have employed, to give to such a ryot no greater right or interest in the land than that of retaining possession of it so long as he pays a rent equal to that which other persons having no such right may be willing to pay.

I think, if we advert to the previous law, as we must do in order to give a proper construction to the words "fair and equitable," we shall have little difficulty in concluding that this construction is incorrect.

Act X. of 1859 is not for the most part an Act introducing new law. It is, as the preamble declares, a re-enactment with modifications of the provisions of the then existing law relative (among other things) to the rights of ryots with respect to the delivery of pottahs and the occupancy of land. The Act defined and settled several important questions connected with the relative rights of zemindar and ryot which had remained undefined and unsettled from the commencement of legislation in Bengal; and it further collected in one enactment the existing laws connected with rent and the occupancy of land which were before contained in a great number of Regulations extending over a period of 60 years.

It may be that, while re-enacting and modifying and defining, the Act does, in fact, in some respects, also extend the old law in such a way that not only are old rights restored, but some new rights have been created. However this may be, it is our duty to give full effect to all its provisions.

The first question which arises for our decision is whether, by the 6th Section, a right of occupancy is given to all occupants who have occupied their present holdings for 12 years, or only to those who, after the passing of this Act, shall occupy for 12 years. As to this, the rule of construction is clear. Laws are generally to be construed to be prospective, and intended to regulate the future conduct and rights of persons; but where the intention of the Legislature is manifest and unambiguous, the Court is as much bound to give effect to it here as in other cases. The words of the Section in my judgment plainly include all occupants for 12 years, as well those whose occupation had commenced before the Act passed as future occupants; and this view is strengthened by the mode in which old laws are presently repealed, the new enactment being evidently intended forthwith to supply their place.

I have said that, in my opinion, we must look to the previous legislation on this subject in order to construe the Act of 1859. Much of the legislation of 1793 remained in force when the Act passed. I will very briefly state the effect of the principal laws of 1793 and of subsequent years; but, before doing so, it is also necessary to advert to the state of things prior to the commencement of our legislation.

Before the Permanent Settlement and from a time long previous to our rule, the state of property in land here seems to me to have been a kind of joint ownership between the Government and the cultivators. The revenue of the Government was derived in a great measure from the land. The Government was entitled to a portion of the produce, and the cultivator was entitled to the rest. The share of each was ascertained, and the right of the cultivator to hold his land so long as he paid his assessment to the Government was never questioned. It is true that the State did not limit itself to the share of the produce set apart for it. It was the judge of its own wants, and had the power to exact at will from the cultivator; but, in fact, it so far recognized and respected the established mode of division that its increased demands did not take the shape of an increase in the cultivator's rent. The "*ussul jumma*" or original rent remained unchanged. Of the many assessments which burthened the ryot's lands, this one invariably took the lead, and had the semblance at least of governing the mode by which the others were determined.

When I say that the State and the cultivators were together the owners of the lands, I do not mean to deny that intermediate rights of property of various kinds existed. But such rights had for the most part, I think, a later origin than the others. They generally (although not always) originated either in the authority which was given to persons of various degrees to collect from the cultivators the portion of the gross pro-

duce which belonged to the State, or in a gift by the State to individuals of its share of the produce. Those who collected the Government share were, in fact, so far as the Government was concerned, mere stewards or administrators, holding whatever they possessed in that character by a very precarious and uncertain tenure; but, as against the ryots, they undoubtedly had great powers, and it is certain that they increased their incomes by collecting from the latter, under various names and pretexts, sums far in excess of the amount which they paid to the Government, or which the Government could fairly demand. But whatever was the position and authority of these intermediate persons, they had of right nothing that was intended by the State to enable them to trench upon the interests possessed by the cultivators, and it was the admitted right of the Government, and one which has never been relinquished, to interpose its authority for the protection of the cultivators. Indeed the ancient revenue system made provision (which perhaps our own system might well have adopted more effectually than it did) at once for the protection of the cultivators from oppression, and for securing the full legal right of the Sovereign, for it was the duty of certain officers who were independent of the zemindars to record and preserve whatever information was requisite to protect the ryot from exactions, and the State from loss. The great body of cultivators were persons settled on the lands cultivated by them, and having a right to hold their lands undisturbed so long as they paid their dues, the amount of which was ascertained (so far as it was at all lawfully ascertained) neither by the will of the zemindar nor by competition. As to the latter, it has been well observed that, "in a situation in which the revenue of the Sovereign was increased in proportion to the number of cultivators, and in which a great proportion of the land continued void of cultivators, there would be a competition, not of cultivators for the land, but of the land for cultivators. If a ryot cultivated a piece of ground and punctually paid his assessment, the Sovereign would be far from any wish to remove him, because, it would be difficult to supply his place." There were also other cultivators who migrated from time to time from one place to another. The former, the khood-kasht, were by far the most numerous and important class. The latter, the py-kasht ryots, had little or none of the local attachment which facilitated exaction from the fixed occupant. They would not submit to so high an assessment as the khood-kasht; and, when they were oppressed, they easily abandoned the lands cultivated by them.

When the British Government had succeeded to the rights of the former rulers, and had experienced the evils arising from an arbitrary and uncertain assessment of the Government revenue, it was resolved to fix permanently the annual payment to be received by the Government (so as to give inducements to other persons having interests in the land to improve and extend cultivation), and also to convert the zemindars into landowners.

The Regulations of 1793 finally established the permanency of the Settlement. Those Regulations and the contemporaneous public papers, which have been quoted on both sides during the argument, clearly show both what was then given to the zemindar, and what was withheld from him. In my judgment, he received nothing from the State which can justify the argument which has been put forward on his behalf, that his vested rights are impaired by the construction of the late Act which we are about to adopt. By the limitation of the Government demand and the conversion of his zemindaree tenure into a right of proprietorship, he gained much. Henceforward he alone was entitled to the profits to arise from the cultivation of the vast tracts which then lay waste and uncultivated, and from the growth by the ryots of the more valuable articles of produce on which an increased rent was payable. But the estate of which he became the proprietor was not an unencumbered estate, with which he was free to deal as if he alone was the proprietor. Besides the Government revenue, there

were other charges upon it which materially limited his ownership. The ryots having rights of occupancy did not derive their rights from him, but from a title anterior to his; and the Government, in its bounty to the zemindar, gave only what it justly could give, that is to say, what belonged to itself, nor what belonged to others. Nothing was given to him which could trench upon the cultivators' rights, or which could justify a continuance by him of the exactions by which the ryot had been oppressed in former days. The laws of 1793 distinctly prohibited the imposition of any new abwab or cess. They directed the consolidation of all existing demands and the issue of pottahs with the amount or rate of rent specifically adjusted. They also provided for the renewal of pottahs at determinate rates when cancelled under the rules existing against collusive or improvident agreements. The zemindar was bound to respect the laws in force at the time of the Settlement. He was allowed to let the remaining lands of his estate in whatever manner he thought fit *under the restriction prescribed by law* (*see* Reg. VIII. of 1793, S. 52). He was free to engage or not with a new comer; but, as regards all ryots on his estate who were entitled to demand pottahs, he was bound, if a dispute arose concerning the rate of rent, to submit the matter to the decision of the District Court (Reg. IV. of 1794), which was directed to fix the rent "according to the rates established in the Pergunnah" for similar lands. These provisions at least show the intention of the Legislature to protect the ryots from enhancement at the discretion of the zemindar or otherwise than by determinate rates.

But unfortunately, while the rights of the State and of the new proprietors were defined by law with sufficient certainty, all attempt to define the rights of the cultivators was postponed. The remedy given to them by suit in Court was practically worthless, or of little avail, because no sufficient rules for the guidance of the Courts had been provided by the Legislature (which has authority to give and is bound to give to the tribunals the rule of decision, and not to devolve upon them the task of searching for and inventing rules). The ascertainment of the established rates of the Pergunnah appears even at that period to have been a matter of great difficulty and uncertainty.

The laws of subsequent years tended more and more to depress and injure the great mass of cultivators having rights of occupancy. The powers which the Government had thought necessary to reserve to itself for the recovery of the land-revenue from the zemindars were far greater than those possessed by the zemindars for the recovery of their rent from the ryots. It was, therefore, found necessary in 1799 to give the zemindars (Regulation VII. of 1799) summary and stringent powers against the ryots, including what was understood to be a power to oust the cultivator from his lands, leaving to him the remedy of a regular suit for their recovery, if he felt aggrieved. No measures were meanwhile attempted for the ascertainment or more effectual maintenance of the cultivators' rights, and in 1812 it seems to have been thought by the Legislature that all further endeavour in that direction was hopeless. The Regulations of 1812, by which the zemindar and ryot were authorized to make engagements at any rate of rent and for any term, have been regarded in very different lights. On the one hand, it has been supposed that they merely took away the old restriction on the zemindar's power of leasing without in any way affecting the ryot's rights; while, on the other hand, they have been regarded as having authorized the ouster of even the hereditary ryots from the possession of their lands when they refused to accede to any terms of rent which might be demanded of them, however exorbitant.

Whichever view may be correct, these Regulations of 1812 were no part or condition of the Permanent Settlement.

That portion of the permanent zemindary system, which gave powers to the Government to sell the zemindar's estate for arrears of revenue, further tended materially to injure the ryots. Whatever bonds may previously have united the two classes of hereditary payers and

receivers of the land revenue, they were materially weakened by the operation of the Sale Laws. The precise nature of the interest and title conveyed to persons purchasing at public sales for arrears of revenue was not defined by the first Sale Law, under which a vast number of sales took place; and serious injury was doubtless sustained by the inferior tenants, in consequence of the latitude given to auction-purchasers. All the old engagements were cancelled by the law. It is true that the ryot was entitled to claim a new pottah at the Pergunnah rate, and he might resort to the Courts to obtain it; but this remedy was, as has been already stated, practically of little or no value.

The later Sale Laws of 1841 and 1845 contained provisions still more unfavorable to the cultivators, for they gave to purchasers unlimited powers of ejectment and of enhancing the rents of ryots. They reserved the rights of a class who were described as "khood-kasht *or* kudeemee ryots," referring apparently to the same class who had been described in the previous Sale Law (Regulation XI. of 1822) as "khood-kasht kudeemee ryots or resident and hereditary cultivators." This reservation introduced a distinction between "khood-kasht" and "kudeemee khood-kasht," and was, I suppose, framed to give protection to no other than the khood-kasht of the time of the Permanent Settlement, and to those who derived their holdings by inheritance from him. But even as regards the class thus saved, after the lapse of half a century, during which the law was ineffectual adequately to protect the cultivators, this class of ryots would necessarily be under great difficulties in supporting their rights by sufficient evidence.

The khood-kashts were generally little disposed to comply with the law respecting pottahs. Their holdings were usually antecedent to written engagements, and they objected to any writing defining the amount of rent payable by them, from an apprehension that it might be regarded as derogating from their previous undoubted rights, and creating a new and less certain title.

The combined effect of the several causes which have been referred to, and mainly the defective legislation of 1793, and the omission of all attempt to define the rights of the cultivators, together with the adverse tendency of subsequent legislation, was, that the undoubted rights of the great mass of the cultivators to hold their lands exempt from arbitrary enhancement, and subject only to customary rates of rent, were nearly obliterated and lost. The object of the Act of 1859, apparently, was to restore those rights; and, to do this, it was necessary to define the class of persons who should be considered to have rights of occupancy. The 3rd and 4th Sections relate to ryots who have held at fixed rates of rent from the time of the Permanent Settlement, and to the proof necessary in support of their rights. The following Sections relate to those whose holdings are at rates not fixed. Before its enactment, the great majority of cultivating ryots, had their rights been duly observed and maintained, were entitled to hold their lands undisturbed on the due payment of their rent, and could not be compelled to pay rent, at a rate dependent on the mere will of the zemindar, or otherwise than according to the customary rates or those prevailing in the district. The ryots generally were not migratory, but remained settled on the lands which they occupied. I do not think that the right of occupancy was formerly confined to those who had acquired such a right by prescription. It extended to all who had given unequivocal proof that they intended permanently to remain at the place of their settlement, and who had been recognized as fixed residents of the locality, although their holding may have been of recent date. The khood-khashts were doubtless, ordinarily, persons who derived their holdings from their ancestors, and whose rights were of old date; but I agree in what I understand to be the opinion of other members of the Court, that length of time or ancient origin was not essential to his existence, and that the language of the later Sale Laws unjustly limited the protection given to this class by recogniz-

ing only the rights of the kudeemee or ancient khood-kasht.

Having regard to past history and legislation, which seem to me in such a matter as the present to be our necessary guides, I feel bound to say that those who have rights of occupancy under Section 6 of the Act are fairly and equitably entitled to a more substantial right than that merely of holding at such a rate as mere strangers might fairly be asked to pay. And since the Legislature, when it imposed upon the Courts the task of dividing the increased value of the produce of the land between zemindar and cultivator (giving no other rule of decision than this—that the rate to be paid by the latter must be fair and equitable), could not have meant to entrust the Courts with an arbitrary discretion to make any division which might appear to them fair. I think we should construe the words as near as may be in the sense which they would have borne in the old law in settling the relations between landlords and ryots having rights of occupancy, that is, in my judgment, that the fair and equitable rate is the rate ruling in the neighbourhood (as described in the 1st Clause of the 17th Section). If the tenant holds at a rate below this, his rent should be enhanced to this level.

When the rents of adjacent lands have not adjusted themselves to the increased value of produce, "the method of proportion" is suggested to be that which was contemplated by the Legislature by the words "fair and equitable." I do not dissent from this view, and I can myself suggest no more probable meaning. It is remarkable that no distinct provision appears to have existed formerly for a general enhancement of the customary rates. The State in former days, before the land revenue was fixed, and the zemindar always were able, by means of abwabs or other cesses, to obtain from the ryots more than a full equivalent for any increase in the value of produce. The law has now prohibited all such cesses, and requires a consolidated rent to be fixed.

It was never intended that rent should not be fairly raised as the value of produce increased; but unfortunately no distinct rule has been laid down for their enhancement where the existing rates of rent in the neighbourhood have remained unaltered, notwithstanding a general rise in the value of produce. I have said that I do not dissent from the proposed "method of proportion;" but it is not without doubt as to whether this is the correct construction in the case supposed of the words "fair and equitable," that I concur in this portion of the judgment with the majority of the Court. In their conclusion regarding the other questions I fully agree.

Mr. Justice Norman.—This case is referred to us in consequence of the conflicting decisions in Hills *versus* Ishur Ghose on the one hand, and Haran Mohun Mookerjee *versus* Thakoor Dass Mundul, 14th September 1864, and Kashee Persaud Mookerjee *versus* Sibnarian Ghose, 26th November 1864, on the other.

I do not think it possible to answer the questions simply as they are put. They present alternatives of which I cannot exactly accept either.

In considering the question of ryots' rents, it was not unnatural that the Court, in Hills *versus* Ishur Ghose, should have adopted, as a rule for ascertaining a ryot's rent, the well-known definition of Mr. Malthus, more particularly as a rule somewhat similar in terms is well known, and is applied successfully and satisfactorily in English Courts for the purpose of ascertaining for rating purposes under the 6th and 7th W. 4 (c. 96, s. 1) the rent which a tenant might be expected to give, so as to get at the "net annual value" of Railways, gas works, waterworks, and other undertakings not usually let at a rent.

Mr. Malthus defines rent to be "that portion of the value of the whole produce which remains to the owner of the land after all the outgoings belonging to its cultivation of whatever kind have been paid, including the profits of capital employed, estimated according to the usual and ordinary rate of agricultural stock at the time being"

In a Minute on the working of Act X., which I believe is now published, I have given my reasons for thinking that this

definition of rent is unsound. It appears to be a statement of the mode in which, and extent to which, the laws of supply and demand act upon rents, rather than a true definition of any rent that ever was, or in the nature of things will be, paid by a tenant to the owner of the land.

Mr. Malthus' definition, taken literally, makes rent the balance of profit over all outgoings, including the estimated profit of agricultural stock, a quantity utterly uncertain and fluctuating from year to year with every change of the seasons or market. Whereas, if there is any one quality which can be predicated of ordinary rent, it is that it is in its nature certain.

The Court in Hills *versus* Ishur Ghose, did not apply the rule literally, and corrected it to some extent by taking an average over several years. But the modified rule, as applied in Ishur Ghose's case, in which the Court alters the words "Agricultural Stock" into "Agricultural Capital," does not in its terms appear to me to make any sufficient allowance for tenants' profits, *viz.*, profits equal to the return which the employment of equal skill and capital in any other occupation or investment might be expected to produce over and above the wages of labor and the bare interest of money.

In the elaborate enquiries necessary in order to apply Mr. Malthus' definition as a rule for the ascertainment of a ryot's rent, it was found that the system broke down by its own weight.

In a case alluded to by the Chief Justice in his Minute on Act X., tried before Mr. Grey, it took two months to record the evidence which was given in one suit for the purpose of showing what was the fair and equitable rent to be paid for a few beegahs of land. Therefore, even if the definition is correct, it does furnish a practical working rule capable of being applied by Courts of Justice in dealing with ryot's rents.

But the original theory of rent in this country, and the rates which, under the laws and customs of this country prior to Act X., were practically obtainable by zemindars, make rent in this country something very different from that which is defined by Mr. Malthus.

At the time of the Decennial Settlement it was recognized that, by the ancient law of the country, the ruling power was entitled to a certain proportion of the produce of every beegah of land (*see* Preamble, Regulation XIX. of 1793). Of this public demand, which was then the sole rent demandable from the ryots, ten-elevenths were considered as the right of the public, and the remainder the share of the zemindar (*see* Preamble, Regulation I. of 1793). Thus, the original theory of rent in this country appears to have been that it was a right to a certain proportion of the gross produce. The Regulations of 1793, which have been already referred to at great length, while formally declaring the property in the soil to be in the zemindars, make provision for the protection of the ryots in their holdings, and for regulating the amount of rent to which they were to be subject.

According to the old Regulations,* if disputes arose between the zemindar and the tenant, the dispute was to be adjusted according to the Pergunnah rate, and not according to the rate which a zemindar might obtain if he could let his land to the best bidder; and this continued to be the law down to the passing of Act X. of 1859.

Mr Justice Trevor has shown what the Pergunnah rates originally were.

The increasing competition for land, the rents which new tenants paid for land unoccupied, or previously held by ryots not having rights of occupancy, or under the contracts which parties would enter into for leases in pursuance of the liberty given to zemindars under Regulation XLIV. of 1793, would naturally tend to raise the average of rents.

The imperfect records of such transactions might be expected to introduce uncertainty into the Pergunnah rates.

* Regulation VIII. of 1793, Section 60.
" IV. of 1794, Sections 6-7.
" XLIV. of 1793, Section 5.
" VII. of 1799, Section 29, Clause 5.
" LI. of 1793, Section 10.

Accordingly, in Regulation V. of 1812, we find that it was declared that "there was reason to believe that the Pergunnah rates were in many instances very uncertain." By Section 6 it was enacted that, "if any known Pergunnah rate shall exist, the same shall serve to determine the amount of rent which should be received by persons deputed to attach lands on the part of Government, or by the purchasers at the public sales." Section 7 enacted that, "in cases in which no established rates of the Pergunnah or local division of the country may be known, pottahs shall be granted, &c., according to the rate payable for land of a similar description in the places adjacent; but, if the leases and pottahs of the tenants of an estate generally, which may consist of an entire village or other local division, be liable to be cancelled under the rules above noticed (the Sale Law Regulation, Section 5, Regulation XLIV. of 1793), new pottahs shall be granted, and the collections made at rates not exceeding the highest rate paid for the same land in any one year within the period of the three last years antecedent to the period at which the leases may be cancelled."

These provisions appear to me to show that, although the zemindars were by the Regulations constituted owners of the land, such ownership was not absolute. The Regulations which created a right of property in the zemindars do not recognize any absolute right in them to fix the rents of the lands at their own discretion. It is clear that, down to 1812, not even a purchaser at a sale for arrears of revenue could enhance the rents of his ryot beyond the Pergunnah rates.

Regulation XLIV. of 1793 had empowered the parties to enter into engagements for a period of years at any rate of rent they pleased, and that power was extended by Section 2, Regulation V. of 1812. But, if the parties could not agree, the pottahs which, by Regulation IV. of 1794, Section 7, were to be at the Pergunnah rates, if no established Pergunnah rates were known, were, by Section 7 of the later Regulation, to be at rates payable for land of a similar description in the places adjacent. Regulation XI. of 1822 would seem materially to abridge the rights which under the former Regulations khood-kasht ryots in Bengal had previously possessed. But it probably did not affect any but the lands of ryots sold under that Regulation for arrears of Revenue. There is nothing in that Regulation to affect the right of those who continued in occupation to hold at the Pergunnah rates. Section 27, Act XII. of 1841, since repealed, but re-enacted by Act I. of 1845, Section 26, provided that a purchaser at a sale for arrears of Government revenue made under that Act might enhance *at discretion* after notice, &c. (anything in the existing Regulations to the contrary notwithstanding), the rents of all under-tenures in the said estate, and eject all tenants thereof, with the exception, among others, of "*lands held by khood-kasht or kudeemee ryots having rights of occupancy at fixed rates, or at rents assessable according to fixed rules under the Regulations in force.*"

Therefore, down to the passing of Act X. of 1859, no zemindar, except the very small class of purchasers under Act XII. of 1841 and I. of 1845, suing to enhance the rent of a ryot, would be entitled to a decree except according to the Pergunnah rate; or, if the Pergunnah rate could not be ascertained, the rate payable for land of a similar description in places adjacent.

It was, no doubt, competent to the zemindar to dispossess any of the very large class of ryots who had no rights of occupancy who would not agree to his terms, and to enter into fresh arrangements with others at any rate of rent on which the parties could agree. But such a course of proceeding for raising rents was apparently not contemplated by the Regulations. In fact, the circumstances of the country have been such that, while, on the one hand, no zemindar would wish to lose his ryots; on the other, the ryots cling to the soil; and the contest between the parties naturally would be, and I believe was, fought out in suits for enhancement, and not by a system of ejectment.

It may well have been one of the objects of Act X. to prevent this powerful engine of extensive ejectment from being brought to bear on a body of cultivators, large numbers of whom must have had some

sort of prescriptive right, vague and indefinite as it may have been, to occupy or cultivate the soil.

No doubt, the right of occupancy before the passing of Act X. of 1859 was exceedingly ill-defined. There is a good deal in the Regulations which leads to the inference that khood-kasht ryots, resident cultivators in Bengal, whether kudeemee or not, had by custom a right of occupancy so long as they paid the usual rate. It seems to me that this custom is recognized in all the Regulations down to XI. of 1822. And a reason for that custom has been suggested to me, *viz.*, that the building or purchasing a house in the village is a security to the zemindar for the ryot continuing to occupy as tenant.

There appears to be no doubt also that py-kasht ryots had in many instances rights of occupancy. (See Directions for Revenue Officers in the North-Western Provinces, page 64.)

Such rights were not only uncertain, but, if ancient, were, from the character and position of the parties by whom they were possessed, often exceedingly difficult of proof.

Act X. does not treat the zemindar's interest as absolute and unqualified so as to enable him to let his land to the *best bidder*. The 17th Section distinctly restrains the absolute power of the zemindar to fix his own price for the use of his land. It matters not how many persons may be willing for their own purposes to give him double or treble the existing rent. He cannot claim increased rent from his ryot unless he can bring the case under the first or second Clause of that Section. The zemindar is therefore evidently under some circumstances bound to take from the ryot lower rates than he might obtain from new ryots if he were at liberty to treat with them.

If, then, the original theory of rent in this country is, that it is the zemindar's proportion of the produce, it seems not unnaturally to follow that (in the absence of any special circumstances) to say that such a rent is fair and equitable, is equivalent to saying that a fair and equitable proportion of the produce of the land has been set apart for the landowner. If it be said that this limits the power of a zemindar to get a rack-rent for the land, I answer that such power is expressly limited by Act X., and that practically such power was limited under the Regulations in force at the time of the passing of Act X.

It is no part of our duty to defend the restrictions on the enhancement of rents introduced by Act X. We have simply to construe and give effect to the Act in the best way we can.

When Section 17 says that no ryot having a right of occupancy shall be liable to have his rent enhanced except on particular grounds, it appears to me that, if enhancement is sought on any one of such grounds, the ground of enhancement must also furnish the measure of the extent to which the enhancement can be permitted.

I agree with the Chief Justice in thinking that ryots holding at fixed rates of rent, or claiming any definite or specific privileges in respect of rent, must be dealt with as ryots claiming to hold lands at fixed rents, or fixed rates of rent under the third and fourth Sections, and for the present we may lay their cases out of consideration in dealing with ryots having rights of occupancy under Sections 5, 6, and 17. No doubt, it is possible to suppose cases in which rents payable at privileged rates might be enhanceable under the latter Section.

1. With respect to the rents of ryots having mere rights of occupancy, a zemindar is entitled to claim from his ryots such rents as are paid by the same class of ryots for land of a similar description and with similar advantages in places adjacent. By the "same class of ryots," I understand, ryots not holding at fixed rates of rent, or with any peculiar privileges as to the rates of rent.

2. If such rents are too low, and the zemindar comes in simply on the allegation that the value of the produce has become increased otherwise than by the agency or at the expense of the ryot, he shows *an increase in the value of that which primarily belongs to the producer, to*

a proportion of which alone the zemindar is entitled. I think it must be taken that the old rent was fair and equitable; in other words, that, at the time when it was fixed, it was the money-value of the zemindar's fair share of the produce of the land; and, in order to give to the zemindar the same share of the produce which he formerly enjoyed, it is only necessary to give him an amount of rent which shall bear the same proportion to the old rent which the present price of the produce does to the former price. The ryot is surely entitled to the same share of the produce as he was under the former engagement—to whatever extent the price of such produce may have increased. It is for the zemindar who seeks enhancement to prove his case, and he must carry back his evidence as nearly as he can to the time when the rent was fixed.

3. If the rent consists partly of money and partly of services, or something equivalent to services, as an obligation to cultivate and supply indigo at a certain price, the value of such contract would have to be estimated and added to the old rent, and in such cases the aggregate value would form a term in the proportion.

4. If a ryot is holding *below the rates* paid by his neighbours, and in consequence of the *increase of the value of produce*, those rates are themselves too low; I think a zemindar may be entitled to the benefit of both ground of enhancement in the same suit.

5. It may be taken roughly, in the absence of evidence to the contrary, that, in general, the cost of cultivation will have increased in a ratio proportionate to that of the increased price of produce. But, in exceptional cases, it may, no doubt, be found that the particular crop for which the land is specially fitted, as cotton or crops on land in the vicinity of a town, has greatly increased in value without any general equivalent rise in the price of labor or the cost of food. In such cases, if the zemindar is not in a position to make out a case under the first Clause, the increased profit may be divided between the zemindar and the tenant as may appear reasonable under the special circumstances of the case; and in like manner any extraordinary increase in the cost of production may be proved by the ryot in answer to the claim for enhancement on the ground of enhanced price of produce.

6. If the *productive powers of the land have increased* otherwise than by the agency or at the expense of the ryot, as was said to have been recently the case with lands on the bank of the Damoodah protected from flooding by the embankments of the Railway, so that the land is capable of producing larger or more valuable crops as a return for the same outlay and the same labor, the whole of such increase appears to me to belong to the zemindar. It is *an increase in the value of that which exclusively belongs to him;* and, in adjusting rent under the 17th Section, it appears to me that the zemindar is entitled to the benefit of such increase subject to any increased expenses which may be caused to the tenant by the collection or realization of the larger profit.

We are all agreed that Act X. applies to all holdings existing at the time of its passing.

As to the question whether the suit is maintainable at all.

In the case of Ramnath Chowdhry *versus* Bhoobunmohun Biswas, Sutherland's Full Bench Rulings, p. 183, in which I was in the minority, I gave my reasons for thinking that a suit for a kubooleut is not maintainable except in the case provided for by Section 9. The ryot may sue for a pottah because he has a right to occupy. But the zemindar has no right to compel the ryot to continue as his tenant, and consequently no right to sue or compel him to enter into an agreement as to the terms of a future occupation, far less to call on him to execute a kubooleut for a definite term of years as is prayed in this suit.

I think, further, that Act X. protects a ryot from all enhancement of his rent except after notice and under the provisions of Section 13. It appears to me that, in entertaining a suit like that now before the Court, we are not redressing any wrong or making a declaration as to any existing right, but are assuming to

determine what shall be the conditions of a future contract between the parties. And this, as it appears to me, is beyond the functions of any Court of Justice. One test is conclusive, *viz.*, if the ryot does not like our decision, he cannot be compelled to execute the kubooleut, and may throw up his land at his own free will and pleasure. Had the Courts refused to entertain suits for kubooleuts, had they confined themselves to trying suits for enhanced rent under Section 13, I think much litigation would have been saved. The parties in each case would have had a considerable time after the service of notice, and before litigation could be commenced, during which they might have treated or had time to consider whether the terms demanded were fair or not. During such negotiation and discussion between the parties as would probably have ensued, each party would have had an opportunity of ascertaining the views of the other, and, even if the ryot did not submit and no terms were settled, some approximation to an arrangement might have been made, and the question for decision might in many cases have been most materially narrowed.

Mr. Justice Steer.—Though I concur in the rule of proportion as held by Mr. Justice Trevor and Mr. Justice Campbell, I do not concur in all their views in regard to the *status* and the rights of ryots prior to the enactment of Act X. It is necessary, therefore, that I should record a separate judgment from those learned Judges, and I will, therefore, proceed to read what I have recorded.

A great deal of argument was used by the Counsel for the landlord and by the Counsel for the tenant, respectively, as to the *status* of the Bengal zemindar and the Bengal ryot previous to the enactment of Act X. of 1859.

The changes wrought by Act X. have, no doubt, made the consideration of this subject of comparative minor importance; still it is not to be passed over as immaterial, for it is of consequence to know what the rights of the tenants were under the old laws in considering upon what principle their rents ought to be enhanced when the new law permits it to be enhanced at all.

Whatever uncertainty existed as to the past condition of the ryots, Act X. of 1859 has made it clear what their present *status* actually is.

The Act divides the whole body of the ryots into three classes—

1st.—Ryots who have held at fixed rates from the date of the Permanent Settlement.

2nd.—Ryots who have acquired a right of occupancy by a 12 years' holding.

3rd.—Ryots who have not occupied for 12 years.

In respect to the 1st class of ryots, the Act declares them absolutely exempted from enhancement, with right of occupancy of course.

In respect to the 2nd class, the same law declares that, on certain grounds shown to exist, their rents may be raised, but the enhanced rent must be a fair and equitable rent upon which terms they are entitled to occupancy.

With respect to the 3rd class, the law leaves them entirely at the mercy of the landlord, both in respect to rent and in respect to occupancy.

No difficulty exists as to the rights declared to attach to the 1st class of ryots; and the great and the almost insuperable difficulty this class laboured under before the passing of Act X. to adduce proof of payment of rent at a uniform rate from the Permanent Settlement has been in a great measure removed by the presumption which the law raises in their favor, *viz.*, the presumption arising from the proof of a uniform payment for 20 years, that the rent has not varied since the Permanent Settlement.

As this class of ryots stood before, they were not only required to prove that they held their lands at a fixed rate from the Permanent Settlement, but that they held them at those rates 12 years before the Permanent Settlement, and that by actual proof. Therefore, when Act X. dispensed with positive proof a fixed payment of rent from a period 12 years antecedent to the Permanent Settlement, and when it raised a presumption of payment at fixed

rates from the Permanent Settlement by proof adduced of payment at an uniform rate for 20 years, it must be admitted that very large concessions were made in favor of this class of ryots.

Great and undoubted, however, as the above concessions were in favor of the above always somewhat privileged class of ryots, they were altogether eclipsed by those which the Act conferred on the next class of ryots.

That a right of occupancy was acquired by anything short of an occupation from a period prior to the Permanent Settlement, an occupation which entitled the ryot to be called a khood-kasht ryot, has always been, I think, a matter of doubt. But no manner of doubt can be entertained that the 12 years' occupancy right was altogether unheard of before the Act suddenly conferred the right.

What ryots were entitled under the old laws to be called khood-kasht ryots, and what ryots were entitled to be considered as ryots who had acquired a prescriptive right of occupancy, are subjects which, I think, have never been cleared up, either by the express authority of law, or by the authority of any judicial ruling. Are khood-kasht ryots then, as spoken of in the Regulations, those, and exclusively those, who were khood-kasht at the time of the Permanent Settlement? Or does the term khood-kasht embrace also those ryots who, since the time of the Permanent Settlement, had, by a long residence in the village in which they held and cultivated land, acquired a prescriptive right of occupancy? These were, I think, even up to the passing of Act X., moot questions, and are so still.

While no doubt exists as to the right of those ryots who, from generation to generation, have cultivated the lands of the village in which they reside for a period antecedent to the Permanent Settlement, and who, without any doubt, are entitled to be called and classed with khood-kasht ryots, the greatest doubt exists as to whether any other class or description of ryots are entitled to be called khood-kasht ryots. If any ryot whose tenure came into existence since the Permanent Settlement can, by any means, be called a khood-kasht ryot at all, it certainly is not the ryot who simply lives in the village and cultivates the land of the village. To be a khood-kasht ryot at all, implies that the ryot must not only be a cultivator of lands belonging to the village in which he resides, but he must be an hereditary husbandman. A khood-kasht right is not acquired in a day, but is transmitted; and it has never, so far as my knowledge extends, ever been laid down what exact length of holding gives a title to a tenant to consider himself a khood-kasht ryot.

Certainly, the old Regulations seem to point to other than those undoubted khood-kasht ryots whom the Permanent Settlement found upon the land; but what length of holding constituted a right by prescription, has never been definitely or inflexibly laid down. If decisions are to be found in which a prescriptive right was deemed established by an occupation short of the Permanent Settlement, there are, on the other hand, plenty of decisions to show that length of occupancy was not deemed to entitle the tenant to be considered anything better than a tenant-at-will. If any other but the ancient ryot occupying from generation to generation had the right of occupancy, no others had it; and, therefore, in a vast majority of cases, Act X., by the 12 years' rule of occupancy, has created rights which never existed before.

Under the old law, then, a great majority of the ryots, who now have undoubted rights of occupancy at fair and equitable rates, were at the mercy of their landlords, and Act X. has, in fact, put all these ryots of doubtful position on the same level. Whether the distinction between the old holder and the modern holder was purposely not recognized by the Legislature when it enacted Act X., for the reason that both were, before the passing of Act X, upon the same footing as respects their position to the zemindar, I cannot say; but, certainly, when no distinction has been made between the two descriptions of ryots, he who has been immemorially on the land, and he who came there only

twelve years ago, it would seem that, in the mind of the Legislature, there was really no difference between them; neither had acquired a right of occupancy as against the zemindar, and neither could, therefore, compel him to recognize them, or force him to enter into engagements with them on any terms.

If, then, the Legislature has not intended that there should be any distinction between the ryot whose forefathers, it may be, first broke up the soil on which his descendants have ever since settled, and the ryot who found the land ready to his hand by the labor of others, the distinction need not have any effect with the Court in laying down the principle which is to be observed in determining what is a fair and equitable rent. What is fair for one, we must take to be fair for the other.

Three separate propositions have been put forward as to the mode of arriving at a fair and equitable rent in the case of a rise in the value of produce otherwise than by the agency of the ryot.

The propositions are—

1st.—That the rent be left to competition, and that the zemindar be allowed whatever rent he could obtain from any other ryot.

2nd.—That the rent be adjusted thus: Give the ryot the benefit of all the profit he now derives from his lands from the last adjustment of his rent: Give him, besides, out of the increased value of the produce, what will repay him for the increased cost of production, and hand over the entire surplus to the zemindar.

3rd.—That the rent be adjusted thus: Presuming that the old rent bore a just proportion to the old produce, give to the zemindar the same proportion as rent out of the present produce.

With respect to the first proposition, such a rule would, I think, not be equitable in the case of any, except a very few of the ryots, to whom the law has given a right of occupancy. To say, that a man has a right of occupancy, and at the same time to put it in the power of the zemindar to deprive him of it by putting his land, as it were, up to auction to the highest bidder, would be unfair to the ryot, and frustrate the intention of the law.

To show the effect of the second proposition, the following case may be taken:—

Former gross produce: Rs.	Cost of production: Rs.	Rent: Rs.	Ryot's profit: Rs.
30	10	10	10

If the value of the produce doubled, then out of the 30 rupees increase, say you deduct 8 rupees as the increase in the cost of production, and the remaining 22 the rule would give to the zemindar. The case would then stand thus—

Gross produce: Rs.	Cost of production: Rs.	Rent: Rs.	Ryot's profit: Rs.
60	18	32	10

Under the third proposition, the following case may serve as an illustration:—

Former gross produce: Rs.	Former rent: Rs.	Ryot's profit, including cost of production: Rs.
30	10	20

Say that the value of the produce has doubled, then the case would stand thus—

Present gross produce: Rs.	Present rent: Rs.	Ryot's present profit including cost of production: Rs.
60	20	40

If the second proposition is adopted, there will, in every case, arise a necessity for lengthened and difficult enquiries. To work out such a rule, it must be ascertained:—

1st.—What was the value of the produce when the rent was last adjusted?

2nd.—What was the cost of production?

3rd.—What was the share of profit left to the ryot after his rent was paid? This would, however, only carry the case over the first stage; there would still remain to be ascertained:—

1st.—The present value of the produce.

2nd.—What rise has taken place on the cost of production. To do this in every case would occasion such an amount of labor that the constituted Courts of the country could never get through it. Moreover, it does not seem fair and equitable that the ryot should get no share whatever of the increase in the value of the produce of his lands, and that though the value of agricultural produce had immensely increased, he

himself is to derive not a particle of advantage from it.

The third proposition is certainly more simple and apparently equitable; such a rule would involve only two points of enquiry, *viz.*, the former value of the produce and the present value of the produce. These points ascertained, the rule could be worked out.

As a general rule, it may, I think, be fairly assumed that the last adjustment of rents was made upon a principle considered fair and equitable to both parties; and that the rent, as compared with the produce, represented the sum which the zemindar was willing to take, and the ryot to pay, as rent. That being, then, in the nature of a contract between the parties under the then state of circumstances, it is only necessary to carry out the principle of that contract into the present state of circumstances to get at a fair and equitable rent. If the former rent was fair as compared with the former value of the produce, the same rule of proportion, if carried out, would give a fair rent now; and, as a general rule, I think this is the rule which should prevail.

It is true that, where the cost of production has not increased in the same ratio with the increase which has taken place in the value of produce, the rule would give to the ryot the larger share of the increase. But it may, I think, be safely inferred that the cost of production would generally keep pace, or nearly so, with the increase in the value of produce, and the rule would scarcely ever be found to operate with too great advantage to the ryot.

If the cost of production has doubled at the same time that the value of the produce has doubled, then the rule, which allows the zemindar to double his claim upon the ryot, is a fair mode of adjusting the matter. But if in any case the zemindar or the ryot could show that the former rent was not fixed with any reference to the former value of the produce, or that, for some special reasons existing at the time, the rent was fixed at too high or too low a figure, then the case would form an exception to the rule, and have, of course, to be treated differently. These exceptional cases would, however, not be numerous, and the rule would serve in all the ordinary cases.

This rule of proportion could not be called into requisition in those cases where it could be shown that the former rent was regulated with reference to some contract, or with reference to some ascertainable mode, whereby either party got a certain fixed or regulated share of the profits. Wherever there was this contract, or custom, or usage, it should be given effect to in any future adjustment of the rent.

I may add that I think Section 6 of Act X. was meant to be retrospective, and I have already expressed my opinion, elsewhere in these notes, that the Act created rights of occupancy which never existed before, and that in that respect the law was not declaratory, but enacting.

The Chief Justice.—This is a special appeal from the decision of the Judge of the 24-Pergunnahs in a suit brought for a kubooleut at an enhanced rent. The Judges who heard the special appeal (Mr. Justice Campbell and Mr. Justice Elphinstone Jackson) have decided that the case must be remanded, and in order to enable them to declare for the guidance of the Lower Courts the principle which ought to be adopted in enhancing the rents of ryots having rights of occupancy where there has been an increase in the value of the produce, they have requested the opinion of a Full Bench on the following questions:—

1st.—When there has been an increase in the value of the produce arising from an increase in prices, and the zemindar is entitled to a new kubooleut from an occupancy-ryot at an enhanced rent at fair and equitable rates, is the fair and equitable rate to be awarded, the rate which might be obtained by commercial competition in the market, or is it a rate to be determined by the custom of the neighbourhood in regard to the same class of ryots?

2nd.—If the customary rate of the neighbourhood has not been adjusted with reference to the increased value of

produce, then on what principle is the enhancement of that customary rate to be adjusted?

The learned Judge, Mr. Justice Campbell, in his judgment to-day, says: "In the present case no attempt is made to contradict or deny the ryot's assertion of ancient holding." But the questions, which I must assume were carefully prepared, are general, and refer generally to occupancy-ryots, and make no distinction between holdings which are ancient and those which are of modern date.

Although the first question refers to an increase in value arising only from rise of prices, I think that the rule which we lay down will be equally applicable to cases in which the increase has been caused by the proximity of a road, or of a canal or railway, opening a new source for carrying to distant parts produce which for want of roads was formerly necessarily consumed in the immediate neighbourhood. Such causes may raise the value of produce without materially raising the price of labor, or adding to the expenses of production. But we must take care, lest, in answering a general question, and treating it as applicable to particular circumstances, we do not express an opinion which may hereafter be considered as applicable to all cases falling within the general question propounded. My answer is, therefore, confined to the question asked. If there was anything with reference to the antiquity of the holding which takes it out of the general rule, the facts ought to have been stated.

The reference was made in consequence of the conflicting decisions in the cases of Hills *versus* Ishur Ghose, No. 1607 of 1862, decided on the 2nd September 1863. Haran Mohun Mookerjee *versus* Thakoor Doss Mundle and others, decided 14th September 1864, reported in the Weekly Reporter, vol. 1, page 112. Shibnarain Ghose *versus* Kashee Pershad Mookerjee and others, decided 26th November 1864, reported in the Weekly Reporter, vol. 1, page 226.

The papers were sent to the Officiating Chief Justice, and were handed to me upon my return from England; and, considering the importance of the case, not as regards the amount in suit, but with reference to the principle to be established, and the necessity of having a decision by which the Judges would consider themselves bound, I thought it right to request the attendance of all the Judges of the Court, and to have the case decided by them.

The case has been very elaborately argued by Counsel upon both sides; but I cannot say that anything of importance has been brought forward which had not been previously considered in the arguments and in the judgments pronounced in Ishur Ghose's case, and in the Minutes of the Judges written in consequence of that decision. I must confess that I have not heard or read anything since Ishur Ghose's case was decided, which has induced me to alter the opinions which I then expressed; and I should be wanting in sincerity if, out of deference to my learned colleagues, or for the sake of using expressions of courtesy, I were to say that anything which I have heard to-day has led me to entertain the slightest doubt as to the correctness of my former opinion. To that opinion I firmly adhere.

In that case it was held by Mr. Justice Bayley, Mr. Justice Kemp, and myself, that the enhanced rent could not exceed the old rent with such portion of the increase added to it as would render it fair and equitable under the altered state of circumstances; and it was expressly stated that, in determining whether the whole of the increase was to be added, the Judge must be guided by all the circumstances of the case. It was said: "In the absence of proof to be contrary, he may take the old rent as a fair and equitable rent with reference to the former value of produce—he must take into consideration the circumstances under which the value of the produce has increased, and whether those circumstances are likely to continue, and whether the value of the produce is likely to keep up to the present average in the ensuing year. *He must consider whether the costs of production, including fair and reasonable wages for labor and the ordinary rate of profits derived from agriculture in the neighbourhood, have in-*

creased, and he must make a fair allowance on that account."

The decision in that case, whether right or wrong, was not a hasty one. The Judges before whom it was heard were fully aware of the importance of the judgment they were called upon to pronounce, and of the numerous cases which would be governed by the principle to be laid down. They, therefore, took time to consider, and the judgment was not pronounced until they had given their utmost consideration to the case, and had expended much time in endeavouring to arrive at a just and sound conclusion which might govern other cases then pending, and might form a precedent for future cases. The principle of that decision was, that the ryot was entitled to the full benefit of the old rent, and that it could not be enhanced beyond the amount warranted by the ground of enhancement. Rules were laid down for the guidance of the Judges in determining the facts, such as, "rents which new ryots would pay," and the definition of rent by Malthus, merely as a guide to the Judge; some rule being necessary to ascertain what was the actual value or rack-rent, in case there should be no evidence of market-value. In fact, the Judge stated expressly that there was no evidence of market-value.

The case of the Queen *vs.* the Grand Junction Railway Company, 4 Queen's Bench Reports, p. 18, has been referred to. In that case the Court held that in ascertaining for rating purposes the rent at which the Railway might be reasonably expected to let to a tenant from year to year, the only deduction from gross receipts on account of tenant's profits was a percentage on the capital employed. This deduction was in the particular case calculated at 20 per cent., having regard to the fair profits of such a trade carried on by means of so large a capital and with such large risks.

This percentage was allowed in addition to 5 per cent. interest on the capital and all other expenses of carrying on the business of carriers.

It appears to me that the deductions which were made in Ishur Ghose's case were quite in accordance with the principle of that case, for, under the definition of Malthus, not only interest, but profits on capital, were allowed in addition to evey expense of cultivation.

As my opinion is in the minority, and, I may say, stands alone, I feel right to point out more at large the reasons which still influence my mind, and prevent me from yielding my opinion to those of the other Judges of the Court.

In the judgment given in review in Ishur Ghose's case, I showed—

1st.—That the zemindars were in 1793 declared to be the proprietors of the lands, and encouraged to exert themselves in the cultivation and improvement of their estates, under the certainty that they would enjoy exclusively the fruits of their own good management and industry, and that no demand would ever be made upon them for an augmentation of the public assessment in consequence of the improvement of their respective estates.

2nd.—That from 1793 to 1812 they were prevented from granting pottahs or leases to ryots for terms exceeding 10 years; and consequently could not, during that period, have created ryots with hereditary rights of property in the soil.

3rd.—That after Regulation V. of 1812 they are entitled to grant leases to all new ryots, and to all ryots who were not entitled to demand a renewal of their leases, such as khood-kasht ryots *at any rent* and for any term that might specifically be agreed upon between them; and that such leases, whether in perpetuity or for any term, were binding upon the zemindars and their heirs or assigns; and that the Courts were to give effect to the definite clauses of the engagements, *and to enforce payment of the sums specifically agreed upon.*

4th.—That, if the ryot's original holding commenced after the date of the Permanent Settlement (and that if it commenced before, it was for him to prove it either by positive or presumptive evidence), he was entitled to have effect given to any definite engagement between him and the landowner, either as to the duration of the term, if any was specifically granted to

him, or as to the amount of rent to be paid, or the rates at which it was to be assessed. But that if he failed to prove that any such engagement was entered into, or that the term for which he was to hold was ever fixed or defined, or that any stipulation was made as to the rate of rent at which he was to hold, he must be considered to have entered and held as a tenant for one year only, and to have continued to hold on with the consent of the landowner from year to year, or according to the language more generally used in this country, as a tenant-at-will; and that, but for Act X. of 1859, he would have been liable to have his tenancy determined by the landowner, and to be turned out of possession at the end of any agricultural year. It was stated that it was unnecessary to determine whether, according to the law of this country, any notice to quit would have been necessary or not.

If by custom or usage a notice to quit was necessary, the royt would of course be entitled to it before his holding could be determined.

After Regulation V. of 1812, a landowner had as much power to fix his own rents and terms as regards all new ryots and all others, except the khood-kasht ryots and such others of the old ryots as were entitled to a renewal of their leases, as any land-owner in England

It has been observed in a book of very considerable authority on these subjects—I mean Directions for Revenue Officers in the North-Western Provinces, promulgated by the Lieutenant-Governor, and prepared, I believe, originally by the late Mr. Thomason, p. 61, para. 121—that "much confusion has arisen from the neglect to distinguish between proprietary and non-proprietary cultivators"—and it is there stated (paras. 121 to 128) that, "throughout Hindoostan, there is a large body of persons possessing an heritable and transferable property in the soil, who are also cultivators, and their profits as proprietors and as cultivators are sometimes so mixed together that it is difficult to distinguish between them and the non-proprietary cultivators.

"In many parts of Bengal, Behar, and Orissa, at the time of the Permanent Settlement, no attempt was made to distinguish proprietary from non-proprietary cultivators, but all were left indiscriminately to the mercy of superiors who contracted for the Government Revenue, and who, whatever was their origin, were distinct from the village proprietors. A similar error was nearly committed in the Talookdaree Estates in the North-Western Provinces.

"A remedy for this manifest injustice has been often sought by an attempt to provide protection equally for all classes of cultivators, and the advocates for such measures have argued upon acts which, in truth, indicated the existence of much higher rights than those of mere cultivators.

"The importance of the question is much diminished when the proprietary have been carefully separated from the non-proprietary cultivators, and the former confirmed in all the privileges to which they are justly entitled.

"Still it is incumbent upon the Settlement Officer to define precisely the position of non-proprietary cultivators, *in order that no doubt may remain as to the party entitled to benefit by future improvement of the land.* So long as this is doubtful, exertion will be discouraged.

"Non-proprietary cultivators are generally either the descendants of former dispossessed proprietors, *or they have been located on the estate by the present proprietors, or their predecessors. Their best security no doubt consists in the demand for their labor. A zemindar commonly reckons his wealth by the number of his Assamees, and the fear of losing their services is often a sufficient provision against harshness or severity towards them.*

"*There can, however, be no doubt that many non-proprietary cultivators are considered to have rights of occupancy,* and thus two classes are commonly recognized—*those who are entitled to hold at fixed rates, and those who are mere tenants-at-will.*

"Cultivators *at fixed rates* have a right to hold certain fields, and cannot be ejected from them so long as they pay those rates.

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They have no right of property in the fields, and are not able to alienate them without the consent of the proprietors; but their sons, or their immediate heirs, residing with them in the village, would succeed on the same terms as themselves: nor are they competent of themselves to perform any act which is considered to indicate proprietary right, such as the digging of a well, the planting of a garden, or the location of a laborer. Their simple right is to till their fields themselves, or to provide for the tillage, *and for these fields they pay certain rates*, and are in some cases liable to be called upon to perform certain services, or to pay certain fees to the proprietors. *So long as these conditions are fulfilled, they cannot be ejected from their fields;* and, if an attempt is made to eject them, they have their remedy by summary suit before the Collectors. If they fail to pay the rent legally demandable, the proprietor must sue them summarily for the arrear, and on obtaining a decree in his favor, and failing after it to collect his dues, he may apply to the Collector to eject them, and to give him possession of the land.

"Tenants-at-will have no right extending beyond the year of their cultivation When at the commencement of the agricultural year they agree to cultivate certain fields on certain terms, they are entitled to the occupation of those fields on the specified terms during the year; but at its close their right terminates."

I do not believe that, even before the Permanent Settlement, every cultivator who resided in the village in which his lands were situate, whether let into possession for a term or only as a tenant-at-will, or to hold from year to year, necessarily became a khood-kasht ryot.

The definition of khood-kasht in Wilson's Glossary (287) is, a "cultivator of his own hereditary land." The word "khood," self or own, and "kasht," to sow, show that the term has reference to some proprietary rights, rather than to the fact of residence in the village. In column 267 of the same Glossary, tit. khood-kasht, the definition is, "a resident cultivator, one cultivating *his own hereditary lands*, either under a zemindar or a co-parcener in a village. In Bengal, one class of them holding their lands *at fixed rates by hereditary right*, sometimes sub-let them, except the part about their dwelling, in which they continue to reside; and, although *ceasing to cultivate and engaged in trade or business*, they retain their designation of khood-kasht. The term is also applied in the North-Western Provinces to lands which the proprietor, or the payer of the Government revenue, cultivates himself.

A khood-kasht ryot probably derived his title by descent from, or succession to, one of the old village community, or some person who in ancient times had acquired a proprietary right in the land under the old Hindoo or Mahomedan Law by reason of his having reclaimed it. Menu says: "Sages pronounce cultivated land to be the property of him who cut away the wood, or who cleared and tilled it." (Chap. 9, para. 44.) So property in waste land was, according to Mahomedan Law, established by reclaiming it with the permission of the Imam according to Aboo Huneefa, and by the mere act of reclaiming it according to Aboo Yusuf and Mahomed. (*See* Baillie on the Land Tax of India, Cap. 6, para. 42.) But, however this may be, it is clear that, since Regulation II. of 1793, by which the right of property was declared to be vested in the landholders, *i. e.*, in the zemindars and independent talookdars, property in land which formed part of a permanently settled estate could not be acquired by reclaiming it from waste. How, then, could it be acquired except by contract or adverse possession, or by prescription going back as far as to the time of the Permanent Settlement? I am of opinion that neither a right of proprietorship nor a right of occupancy could have been acquired by any other means in a permanently-settled estate.

The directions to Revenue Officers, para. 130, show that the right depends upon prescription. It is there said: "It is impossible to lay down any fixed rule, defining what classes of cultivators are to be considered entitled to hold at *fixed* rates. They are known in different parts

of the country by different names, as chupperbund, *khood-kasht*, *kudeemee*, mourosee, hukdar, &c., all of which terms imply attachment to the soil *or prescriptive right*. Those who have no such right are commonly called kutcha assamees or py-kasht. *It has sometimes been supposed that all ryots resident in the village (khood-kasht) are of the former class, and that those who reside in another village (py-kasht) have no rights. But there are frequent exceptions to this rule. Many cultivators residing in the village are mere tenants-at-will, whilst those residing in neighbouring villages may have marked and recognised rights. Prescription is the best rule to follow.*"

I am clearly of opinion that a ryot who, after the date of the Permanent Settlement, and especially after Regulation V. of 1812, was let into possession by a zemindar to hold as tenant for a fixed term, or at will, or from year to year, or without defining the period during which his tenancy was to continue, did not, before Act X. of 1859, merely, by reason of an occupation for 12 years, become a khood-kasht ryot. But it is not necessary to determine this point, because Section 6 of Act X. of 1859 makes no distinction between a khood-kasht and a py-kasht ryot. Each, if he has occupied for 12 years, has had a right of occupancy conferred upon him by that Act, which is hereafter shown to have had a retrospective effect.

It was suggested that the 6th Section substantially converted every ryot who had occupied for 12 years into a khood-kasht ryot, and gave him a right to hold at fixed or customary rates. But there is nothing in the Act which, in my opinion, discloses any such intention.

In my former judgment in review in Ishur Ghose's case, I showed that, prior to Act X. of 1859, even a right of occupancy could not be gained merely by an occupation for 12 years. I there reviewed the authorities of the late Sudder Court upon the subject, and I referred to the case of Degumber Mitter and Ramsoonder Mitter, Sudder Decisions, 1856, page 617, in which, at page 624, it was held that the failure or forbearance of the zemindar to demand an increase of rent during 12 years did not create a right of occupancy.

A similar decision was come to in the case of Mussamut Lallahoonissa Khatoon *versus* Ram Gopal Sein, same volume, page 665.

I have not heard the authority of either of those cases impugned, nor has it been contended that, before Act X. of 1859, a mere occupation for 12 years conferred a right of occupancy, or a right to hold at less than the actual value of the land.

The Civil Law, in which it has been said "that we have the most complete, if not the only, collection of the rules of natural reason and equity* which are to govern the actions of mankind," and which has been called "*ratio scripta*," as containing the most perfect rules of reason for deciding all differences between man and man, held that a farmer or tenant could not acquire by prescription what he held by that title; "*for*, in order to prescribe, it is necessary to possess, and to possess as master."† But where a ryot or tenant holds at a certain rent with the consent of his landlord, there is no adverse holding at that rent. If a ryot could prove that he had held land for many years, and that, whenever his rent was altered, he had claimed to hold at a fixed rent, or at a rent assessable according to some definite rules, and that such claim had been acquiesced in by the landowner, he would have evidence from which a prescriptive right to hold at that rent might be presumed; but a mere occupation of land for 12 years at a fixed rent, or at rent which had been varied at the pleasure or caprice of the landowner, would be no evidence of such a right. That was expressly laid down by the late Sudder Court in the case, to which I have above referred, of Degumber Mitter *versus* Ramsoonder Mitter, Sudder Decisions, July 1856, page 617; and that decision was quite in accordance with the rule of the Civil Law.

In that case four Judges (Mr. Raikes, Mr. Colvin, Mr. Patton, and Mr. Trevor), reversing the decision of the Lower

* Dr. Strahan Int., page 5. † Domat 2227.

Appellate Court, held that the landlord *was entitled to enhance his rent to the full actual value of the land*, at which it had been assessed by the first Court. They said: "It has been shown by Baboo Ramapersaud Roy in the precedents of the Court referred to in his argument, how the current of decisions have run on this question since 1845, and that this Court has, on several occasions, under different forms of words, almost invariably ruled that 'the claim to assess, being a perpetually recurring cause of action, cannot be barred by lapse of time.' We would also refer to another case (not cited) at page 188 of the printed Decisions for 1849—Dupnarain Roy, appellant, *versus* Sreemutee Roy and others—as a case in point. The suit there was for re-adjustment of rent by a ryot, on the ground of excessive rates, the zemindar pleading payment of the rates objected to by the ryot for upwards of 20 years. A special appeal was admitted to try whether lapse of time was not a fair and legitimate plea against the action, and the ruling therein was that, as the zemindar had produced no engagement binding the ryot to any particular amount of jumma, or as being in possession of any particular mehal of known boundaries, on which rent is payable without reference to what may be found, at any period, to be its exact extent by correct measurement, the ryot is not barred by having paid an uniform rent for more than 12 years, from claiming a measurement and re-adjustment of the rent in the same manner as a zemindar, when not bound by express engagement, has *always a claim to* a like measurement.

"These precedents must be held to establish the principle that, unless the landlord and tenant are bound by express engagement to an uniform rate of rent, the right to raise or reduce it, however dependent on other circumstances which may govern each particular case, is a right that cannot be disputed on the plea of lapse of time, nor be extinguished by prescription.

"The appellant's pleader has also proved by the submission of competent authorities on the subject that under the English Statutes the law of limitation and prescription was held not to apply to suits of the nature before us. *The reasoning on this seems to be that, as the tenant's possession is from the first a possession with the consent of the landlord, it must be considered as permissive, however long it may continue, and that no length of time can therefore bar the landlord's right of recovery, or secure to the tenant a title adverse to the landlord's interests.*

"*The connection between landlord and tenant in this country commences on a similar understanding.* The under-tenant in Bengal, whether holding by pottah or as a tenant-at-will, *occupies his land with the consent of the zemindar*, and the rent, however determinable, is only a consequence of the arrangement. Should the zemindar content himself with less *than the local rates in the case of a tenant-at-will, the law only imposes upon the zemindar the necessity of serving such tenant with a notice before he can legally raise them;* but the precedents of this Court, cited above, clearly indicate *that the construction put upon the law here as well as in England is the same,* and that the failure or forbearance of the zemindar to demand an increase of rent during 12 years will not change a tenant-at-will into a tenant with permanent rights of occupancy.

"It has been argued by Baboo Shumbhoonath Pundit, on the part of the ryot, that the landlord's receipt of rent at an uniform rate during more than 12 years is evidence of his having abandoned his right to demand more, and prevents the exercise of the right ever after. *But the payment of the same rent for a considerable time by a tenant cannot be proof of the landlord's intention to restrict his own right of demand; it is far too ambiguous a fact to allow of any such conclusion being drawn in favor of the tenant.* It is, moreover, an argument practically inconsistent with any application of the limitation law. If that law, as assumed, barred the *right* of the landlord to re-assess the lands for ever, he could not exercise that right in the event of the lands

being abandoned by the present occupant, the application of the law would not only affect his right over the present tenant, but would apparently fix the rent of the land at the present rates for ever.

"The Court, therefore, see no reason whatever to depart from the principle inculcated by the precedents, which hold that the Law of Limitation is inapplicable to suits for the adjustment of rents."

Mr. Torrens, who dissented, said: "If a zemindar neglects all the requisitions of the law, which, under his settlement, he is bound by, he cannot come into Court, and reap an advantage from his own laches, saying that at any time whatever, without respect to any general Law of Limitation, 'I have a right to be heard in question of my ryot's tenure, and to enhance at my discretion the assessment payable on it. *It is true that I have not fulfilled any of the requirements of the law by settling with my ryots, or by giving the documents required of me to the Collector; it is true, too, that my ryot has asserted his right to hold at fixed rates for these last 30 years; that I have not before questioned this; but now that he has laid out all his capital under the security relied on from my silence, and from my receiving from him only at the rate given in my zemindaree accounts, I wish to raise his assessment tenfold, and, if he cannot pay, eject him.' This state of things was, I apprehend, never intended by the Decennial Settlement, but such would be the consequence, especially since the enactment of Act I. of 1845, if the Law of Limitation cannot be held applicable to suits of this nature.*"

I should concur with Mr. Torrens, if it had been proved, as he alleged, that the ryot had asserted his right to hold at fixed rates for 30 years, and the landowner had acquiesced in the claim; but that statement was used rather as an argument than as referring to the facts which had been proved in the particular case before the Court.

The case was determined with reference to a purchaser under Act I. of 1845, but it must be equally applicable to any other landowner who let a ryot into possession under such terms that he was not precluded from raising his rent.

If, after Regulation V. of 1812, a landowner let lands to a ryot at a certain rent without any agreement fixing the term of the holding or binding the landowner not to enhance the rent, or if he should enhance it, to enhance it only according to certain fixed rules, the ryot would not have held at Pergunnah rates, or at customary rates, or at rates payable by similar ryots for similar lands in the neighbourhood; and the principle of the above case would show that a holding for 12 or 20 years would not have created a right to hold at such rates, and that the landowner, even after a holding for 12 or 20 years, would not, before Act X. of 1859, have been precluded, after notice, from enhancing the rent to the full actual value of the land, or ejecting the ryot if he would not consent to pay it.

What presumption then is to be made merely from the fact of a holding for 12 or 20 years not carried back prior to 1812, or to the date of the Permanent Settlement?

Act X. of 1859 created a right of occupancy in all ryots who had occupied for 12 years without reference to the fact whether they resided in the village or not. The act applied to all ryots who had occupied for 12 years, and who were then merely tenants-at-will liable to be removed at the end of any current year, if not without, at least after, a notice to quit, and to have their rents enhanced, after notice of enhancement, to the full actual value of the lands. But was it the intention of the Legislature, when conferring such rights by retrospective operation, to derogate from the proprietary rights which were declared at the time of the Permanent Settlement to belong to the landowners, and to confer on those who were merely tenants-at will, or tenants from year to year, not only a right not to be removed from their holdings, but also a right to hold at fixed rates, or lower rents than other ryots would pay for the same land?

As I said in my former judgment, to hold that the Legislature intended to confer rights of occupancy which did not previously exist at rents lower

than such as could be reasonably obtained from new ryots, would, in my opinion, be giving a construction to the Act which would render it an unjust interference with the vested rights of the landowners in the permanently-settled districts, and a violation of the engagement which at the time of the Permanent Settlement was made with them by Government.

Such a construction cannot be put upon the Act, unless the Legislature has declared its intention by the clearest and most unmistakeable language. I cannot think that the Legislature, by using the words "fair and equitable rates," intended to give a ryot, who obtained possession only 12 years ago when he had no right to the land, and when the zemindar was not even bound to accept him as a ryot, or to admit him into possession, any proprietary rights which would entitle him, without express contract, to participate in any increase in the value of the produce of the land not caused by his own agency or at his expense.

Surely it could not have been necessary, in order to protect the ryots from unwarrantable exaction, to enact that a ryot, who had no right in the land 13 years ago, should, by reason of his having occupied it for 12 years, become entitled to hold it at a less rent than a new ryot would give for it.

It would surprise landowners in England if they were to find that, by an Act having restrospective effect, or by a construction put upon the words "fair and equitable," tenants who had held underleases for 99 years at a nominal rent, or had held for 20 years as tenants from year to year at very low rents, had acquired rights of occupancy, and that, at the expiration of the leases, or upon the determination of the tenancies, they were not merely not bound to quit, but were entitled to hold on at a lower rate than the landowners could obtain from new tenants.

Mr. Justice Campbell has referred to the report of the Select Committee as a legitimate guide for ascertaining the reasons of the Legislature for conferring a right of occupancy upon ryots who had held for 12 years. If he would refer to the proceedings of the Legislative Council for 1859, on the motion of Mr. Ricketts, at page 222, he would find equally legitimate evidence that it was not, in fact, the intention of the Legislature, when using the words "fair and equitable," to render the Pergunnah rates, or customary rates, or the rates payable by similar ryots for similar lands in the neighbourhood, the standard for determining what would be fair and equitable.

The Pergunnah rates were, in all probability, originally intended for the purpose of enabling the Government in assessing the revenue to ascertain what the landowners were, in fact, collecting from the ryots, not that the Government was bound in assessing the lands to treat the rents actually collected as the true value. It was the interest of the zemindars to show that the rents they were collecting were very low, and to make them up by abwabs and cesses. In practice, the Pergunnah rates were seldom found to exist.

If it had been the intention of the Legislature that all ryots, upon whom a right of occupancy had been conferred, should be entitled to hold at Pergunnah rates or customary rates, or, in the absence of such rates, according to a rule of proportion, nothing would have been easier than to have added words to that effect. But they simply declared, by Section 5, that tenants having rights of occupancy were entitled to receive pottahs at fair and equitable rates, which, as I construe that Section, also includes a right *to hold* at fair and equitable rates, leaving it to the Courts of Judicature to fix what would be fair and equitable in each case. It could not have been left to the landowner to fix his own rent, without enabling him to frustrate the intention to give a right of occupancy; for, if he could fix his own rent, he could easily compel the ryot to abandon his holding. There is nothing in the words "fair and equitable" which necessitates injustice to the landowners, or such a construction to be put upon the Act as to render it a violation of the engagement made with the zemindars at the time of the Permanent Settlement. What is just and equitable in each case is left to the Courts, and was intended to be left to them.

The right of occupancy acquired by reason of an occupation for 12 years is the mere creation of Act X. That Act, as I have already observed, did not take away the right of any ryot who had a right by grant, contract, prescription, or other valid title to hold at a fixed rate of rent. The rights of those who have held at fixed rates of rents which have not been changed from the time of the Permanent Settlement are expressly protected by Section 3, and Section 4 has given them a more easy mode of proving those rights.

By the term "fixed rates of rent," I understand, not merely fixed and definite sums payable as rent, but also rates regulated by certain fixed principles—such, for instance, as a certain proportion of the gross or of the net produce of every beegah, or such a sum of money as would be equal to such a proportion of the produce, or such a sum as would give to the ryot any fixed rate of profit after payment of all expenses of cultivation. "*Id certum est quod certum reddi potest*" is a maxim of law. But, if I am wrong in this construction, I think the ryot who could prove such a right would be entitled to the benefit of it in determining what would be a fair and equitable rent for such ryot to pay; what is fair and equitable for one is not necessarily fair and equitable for another. What is fair and equitable for an old ryot who has a prescriptive right to a certain proportion of net or gross produce is not necessarily fair and equitable for the modern ryot, or for one who has occupied for a period of 12 years only at the same rent at which he was let in, or at a rent from time to time enhanced or diminished by agreement without reference to any fixed principles.

When conferring rights of occupancy upon all ryots who had occupied for 12 years, the Legislature distinguished between those who had a right to hold at fixed rates and those who had not. The former were provided for by Sections 3 and 4; the others were to pay such rent as might be fair and equitable.

Holdings at fixed rates from the time of the Permanent Settlement were, by Section 3, substantially treated as prescriptive holdings, giving a right to hold at fixed rates; and Section 4 was passed in order to give the ryot a more easy mode of proving such a holding. The date fixed from which prescriptive rights were to be presumed was the time of the Permanent Settlement—a time prior to that at which zemindars were declared to be the proprietors of the lands and were authorized to fix their own rents and terms and to deal with the land as any other landed proprietors.

This they were authorized to do by Regulation V. of 1812, and the retrospective effect given to it by Section 2, Regulation VIII. of 1819.

Although the Legislature left those who had no prescriptive rights, or rights to hold at fixed rates, liable to pay fair and equitable rates, a limit was put to the grounds of enhancement by Section 17.

One ground of enhancement is, that the rate of rent paid by the ryots is below the prevailing rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent.

But that is not the only ground. The second ground is, that the value of the produce or productive powers of the land have been increased otherwise than by the agency or at the expense of the ryot.

It certainly could not have been the intention of the Legislature when they authorized an enhancement upon the ground of an increase in the value of the produce, or of the productive powers of the land, to limit that ground of enhancement, and to declare that the enhanced rate should not exceed the prevailing rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent.

There could be no good reason for allowing the second ground, if it was to be limited by the first; and, if such a rule were adopted, there would be no mode of enhancing the rents, if they should all be too low.

The first question in the mode in which it is put seems to imply that the learned Judges who propounded it considered that

the fair and equitable rate to be awarded must either be the rate which could be obtained by commercial competition in the market, or the rate to be determined by the custom of the neighbourhood in regard to the same class of ryots. It seems to be only for want of such a customary rate, or in consequence of the rates, as it is said, not having adjusted themselves, that the rule of proportion is to be adopted.

But it has not been found in this case that there was a customary rate which has or has not adjusted itself. Suppose the usual rent was one rupee per beegah for lands of a particular description. Is that rent alwaysto continue, however much the land may improve in value? If not, by what rule is it to be increased? Is there any rule which lays down the standard which is to be applied in increasing it; and if not, is the Court to say, that because there is no custom, or because the rents have not adjusted themselves according to a custom, we will create a new custom, and declare that the custom requires the rents to be increased, so that the landlord's rent may always bear the same proportion to the present gross produce as the old rent did to the old gross produce?

If the rule of proportion was not the custom, how does the right, even if it exists, to hold at customary rates, entitle the ryot to have that standard applied? Is it to be applied as *a principle of natural justice and equity* independent of any custom to warrant it?

In the judgments by which the questions were submitted to a Full Bench in this case, Mr. Justice Campbell and Mr. Justice E. Jackson say that the enhancement should be awarded in proportion to the increase of the value of the *net produce* of the land.

Mr. Justice E. Jackson says—"I agree with Mr. Justice Campbell, that the enhancement should be awarded in proportion to the increase of the value of the *net* profits of the land. By this mode of enhancement, the original agreement between the ryot and the zemindar is retained, and both continue to share in the increased *net* value of produce in the same proportion in which they agreed to share in the net value of produce as it existed when the agreement was orginally made. No sufficient ground is shown by either side to disturb that original agreement."

There was no finding by the Lower Court of any such agreement, and no evidence whatever to prove that any such agreement ever existed, or from which any such agreement could be legally presumed. The mere fact that the rent originally fixed bore a certain proportion to the value of the net produce (which could not be ascertained at the time when the rent was fixed) is no more evidence, either actual or presumptive, of an agreement that that proportion should always continue to exist, than the fact that a certain amount of rent was fixed is evidence of an agreement that the same amount of rent should always continue. There is no more evidence of an agreement that the proportion should always remain the same than there is of an agreement that the amount should always remain the same. But if there was an agreement that the rent should always bear a certain proportion to the value of the *net* produce, why is the rent to be fixed in proportion to the value of the *gross* produce?

It has been contended that Section 17, Act X. of 1859, extends only to cases of suits for enhancement, and not to cases in which the ryot asks for a pottah, or the landowner demands a kubooleut at an enhanced rent.

This view has been apparently adopted by some, but I cannot concur in it.

The Act says that, in the case of a ryot having a right of occupancy, the rent paid shall be deemed to be fair and equitable (S. 5). But the 17th Section says—"No ryot having a right of occupancy shall be liable to an enhancement of the rent pre-

viously paid by him, except on some one of the following grounds."

When a right of occupancy exists, it appears to me that the rent previously paid cannot be enhanced, except for one of the grounds mentioned in Section 17, whether in a suit for enhancement, or in a suit for a kubooleut, or for the recovery of arrears at enhanced rates. The form of the procedure adopted by the landowner to obtain a higher rent than that previously paid cannot alter his right. If it would, landowners would only have to sue for kubooleuts at increased rents, instead of giving notice to enhance and suing for enhancement, or for the recovery of arrears of the enhanced rent.

According to Ishur Ghose's case, the enhanced rate cannot exceed the old rent with such additions as the grounds of enhancement warrant. It is to be the old rent with something added to it. Whatever net profit the tenant derived from holding at that rent, he must, according to the decision in that case, retain after the rent has been enhanced upon the ground of the increased value of produce. If his rent were Rs. 10 or 20 lower than a rack-rent of the land under the circumstances existing at the time when it was fixed, and consequently giving him a net profit to that extent beyond the whole expenses of production, he must continue, after enhancement, to enjoy the full benefit coferred upon him when his rent was fixed, and the enhanced rent must to the same extent be lower than what would be a rack-rent of the premises, having regard to the increased value of the produce; for it is expressly laid down that the enhanced rent cannot exceed the old rent with such portion of the increased value added to it as will render it fair and equitable, and that, in fixing the amount, *the Judge must consider whether the costs of production, including fair and reasonable wages for labor and the ordinary rate of profits derived from agriculture in the neighbourhood, have increased, and if so, that he must make a fair allowance on that account.* In other words, all increased costs of production, including wages and agricultural profits, must be deducted from the increased value of produce before any part of the increase can be added to the old rent. It is only the net, and not the gross increase, or such part of the net increase as will render the rent fair and equitable, that can be added to it. If the market value of the land should exceed the amount of the old rent, with the whole of the net increase added to it, the landowner would not be entitled to the full market value, but must make such a deduction as will leave the tenant the benefit of the full amount of profit which he derived from the old rent at the old value of produce; that is to say, the new rent must be as much lower than a full rack-rent of the land after the increase, as the old rent was lower than a full rack-rent before the increase. To give the tenant more than this without the landowner's consent, would be injustice to the landowner, and consequently cannot be fair and equitable.

It cannot be doubted that Act X. did to some extent encroach upon the rights of the landowner when it created a new right of occupancy even at a fair and equitable rent, and limited the right to enhance to particular grounds, for it deprived the landowner of his right to turn out those ryots who under the old law were tenants-at-will, if they would not come to terms, or if the landowner, for any cause, required to have his land again. But the words of the Act are clear, that the rent cannot be enhanced except upon certain grounds specified in Section 17, and the Courts are bound not to enhance the rent beyond the amount which those grounds warrant.

Let us see how the case would stand according to the rule in Ishur Ghose's case.

Suppose a ryot held land for 12 years at Rs. 100 rent—that the gross value of produce, when the rent was fixed, was Rs. 300, and all the costs of pro-

duction, including labor, interest, and profit on capital (which in Ishur Ghose's case was said to be included in costs of production), amounted to Rs. 100—the case would stand thus:—

	Rs.
Value of produce	300
Costs of production	100
Net value	200
Rent	100
Ryot's net profit	100

In that case the tenant would get Rs. 100 net profit after paying all the costs of production, including profit on capital and wages, whether his own or those of hired laborers.

The ratio of rent to net value was $\frac{100}{200}$ or $\frac{1}{2}$. The ratio of tenant's net profit to net value is the same, $\frac{100}{200}$ or $\frac{1}{2}$.

Suppose the value of produce should be doubled, and the costs of production doubled—

	Rs.
The value of produce would be ...	600
Costs of production	200
Net value	400
Ryot's net profit as before	100
Leaving for rent	300

If the owner's rent were increased to Rs. 300, it would not bear the same proportion to the present gross value (600) as the former rent (100) did to the former gross value (300), or the same proportion to the net value of produce (400) as the old rent (100) did to the former net value (200). It would be one-half instead of one-third of the value of gross produce, and three-fourths instead of one-half of the net value of produce, yet the ryot would still have the same amount of net profit as before.

Unless the ryot is made a co-proprietor by Act X. of 1859, there is no reason why his net profit should exceed that which he derived from his former rent under the old circumstances, and the landowner be debarred of his right to let the land for Rs. 300, if he could procure that amount by competition from ryots who would be satisfied with a clear net profit of Rs. 100 over and above all expenses of production. If the ryot is not contented with the same amount of profit as he made before the rise in prices, he is not bound to remain. He can give up his holding. His right of occupancy does not bind him to remain. It only binds the landowner not to turn him out. Whether it would be the interest of the landowner not to allow the ryot some addition to his former net profit is another matter. In this respect, the demand for labor, and the necessity of giving the ryot some interest to exert himself, would be the ryot's security for liberal treatment by the landowner. The landowner is not bound to allow his ryot to have a net profit of Rs. 200 out of Rs. 400, because, in fixing the rent in the first instance, he allowed him to hold at such a rent as in fact gave him a net profit of Rs. 100 out of Rs. 200. The two cases are very different. If the ryot could show that, by reason of a stipulation in the contract, or by a prescription, he was entitled to have a particular share of the net or gross produce, the case would, of course, be different. But the mere fact of his rent having been fixed originally at Rs. 100 lower than the rack-rent, or at such an amount as did, in fact, give him a net profit of Rs. 100 out of a gross value of Rs. 300, or out of a net value of Rs. 200, does not show that the landowner was bound, either by prescription or contract or custom, to adjust the rent for ever at such a rate as would give him a net profit of one-third of the gross, or one-half of the net produce, whatever might be the amounts. It might with as much reason be said that the ryot was always entitled to hold at Rs. 100 rent, whatever might become the value of the land, because, when the rent was first fixed, he was allowed to hold at Rs. 100. If all the ryots in the district had had their rents adjusted so as to give them a net profit of Rs. 100 out of Rs. 200, it would not create a custom or a right for them all to have a net profit of

Rs. 200, if the value of net produce should increase to Rs. 400.

Every one knows that a business which gives very large gross returns is generally more valuable in proportion than one which gives smaller returns. The copyright of a book of which 10,000 copies are struck off and sold at the first issue, would *ceteris paribus* generally be worth more than ten times as much as one of which only 1,000 copies are struck off and issued. The reason is, that the one gives larger net profits than the other. The author would not probably sell the copyright of the two books at prices bearing the same proportion to the number of copies issued, nor pay a publisher, for publishing and printing the works, the same proportion of the gross proceeds of the sale of the 10,000 copies as he would of the 1,000. Why, then, should a landowner be legally bound to allow a ryot to hold at a rent which, under the altered circumstances, would yield a net profit of Rs. 200 out of a net value of Rs. 400, because he once allowed him to hold the same land at a rent which gave him a net profit of Rs. 100 out of a net value of Rs. 200? There is nothing in the Act which declares that he is so bound; and, if he is not declared to be so, it is only by the Court's construction of what is fair and equitable that he becomes so bound. I confess that I cannot see the equity, or justice, or fairness of such a decision.

Having shown that the rule in Ishur Ghose's case secured the tenant as large a net profit under the altered circumstances as he derived from the old rent at the time when it was originally fixed, I will now consider the equity and justice of the rule of proportion.

It is said, the rent to be fixed must bear the same proportion to the present gross value of produce as the old rent did to the former gross value of produce.

Suppose it should be proved that an agricultural laborer, without any capital or property, 14 years before the passing of Act X. of 1859, applied to a zemindar to allow him to enter upon lands which had been abandoned or deserted by a former ryot who had held as tenant-at-will—that the zemindar consented—that the parties agreed upon a rent, say Rs. 100, without any stipulation or agreement as to the basis upon which the rent was fixed—that the ryot entered and occupied from year to year, and continued in possession upwards of 12 years before Act X. and up to the present time—that, when the land was first let, the gross value of the produce was Rs. 300—that all the expenses of cultivation, including labor, interest, and profit, upon capital and every other incidental expense of production, amounted to Rs. 100. Suppose it should be further proved that the value of the produce had increased from Rs. 300 to 900, and that the expenses of cultivation had been doubled. This is not an improbable supposition, for, in the present case, it was found that the former value of the produce was Rs. 4-8 per beegah, and the present value Rs. 15; the former expenses, Re. 1-4; and the present expenses Rs. 3. The case would stand thus, if the rule of proportion is to apply:—

Before Increase.

		Rs.
Former gross value of produce	...	300
Expenses of cultivation	...	100
Former net value of produce	...	200
Landowner's rent	...	100
Net profit to ryot after paying all expenses of cultivation	...	100

After Increase.

Present value (300 trebled)	...	900
All expenses of cultivation (100 doubled)		200
Present net value of produce	...	700
Landlord's rent (100 trebled)	...	300
Ryot's clear profit	...	400

The ryot received out of gross produce Rs. 200, *viz.*, Rs. 100 for costs of production, and Rs. 100 for net profit.

The ratio of the ryot's clear profit to *gross* value was formerly $\frac{100}{300} = \frac{1}{3}$

The ratio of ryot's net profit to *net* value was ... $\frac{100}{200} = \frac{1}{2}$

The ratio of rent to net value $\frac{100}{200} = \frac{1}{2}$ and the amount of rent and the amount of ryot's net profit were equal.

But, under the altered circumstances, if the rent must bear the same proportion to the present gross value of produce, as the former rent did to the former gross value of produce, the ratio of ryot's net profit to *gross* value will be ... $\frac{400}{900}=\frac{4}{9}$

Ratio of ryot's net profit to *net* value of produce ... ... $\frac{400}{700}=\frac{4}{7}$

Ratio of rent to net value will be $\frac{300}{700}=\frac{3}{7}$ and the ryot's net profit will exceed the landlord's rent by one-seventh of the net value.

Thus, whilst the ratio of the ryot's net profit to net value is increased from $\frac{1}{2}$ to $\frac{4}{7}$th, the raito of the landowner's rent to net profit is reduced from $\frac{1}{2}$ to $\frac{3}{7}$th, and the ryot, instead of having a net profit of Rs. 100, has now a net profit of Rs. 400, which is Rs. 100 more than the landowner's rent.

Again, suppose that, in the course of the next 20 or 30 years, the present gross value of produce should be trebled, and the present costs of production doubled. The case would stand thus :—

	Rs.
Gross produce (900 trebled)	2,700
Expenses of cultivation (200 doubled)	400
Net value of produce ...	2,300
Rent (300 trebled) ...	900
Net profit to ryot ...	1,400
Ratio of ryot's net profit to net value	$\frac{1400}{2300}=\frac{14}{23}$

Ratio of rent to net value ... $\frac{900}{2300}=\frac{9}{23}$

and whilst the ratio of ryot's net profit to net value would be increased from $\frac{4}{7}$th to $\frac{1400}{2300}$ or $\frac{14}{23}$, the ratio of rent to net value would be further reduced from $\frac{3}{7}$th to $\frac{900}{2300}$ or $\frac{9}{23}$, and the ryot, instead of having a net profit of Rs. 100 as at first, or of Rs. 400 after the first increase, would have a net profit of Rs 1,400, whilst the landlord would have only Rs. 900 as rent.

But suppose the ryot, instead of continuing to hold and cultivate the lands, should have ceased to live in the village, and should have under-let them to another ryot who had held them for 12 years when Act X. of 1859 came into operation.

The occupation of the under-ryot would not give him a right of occupancy as against the original ryot, for Section 6, Act X. of 1859, declares that the rule which gives a right of occupancy does not apply as respects the actual cultivator to lands sublet for a term, or year by year, *by a ryot having a right of occupancy.* The first ryot could therefore turn out the under-ryot, and would thus be enabled to obtain a competition rate of rent, or the market-value of the land.

In the case above supposed of the value of produce, Rs. 300 having trebled, and the expenses Rs. 200 doubled, it has been shown that the net value would be Rs. 700, the rent Rs. 300, and the net profit Rs. 400. If the first ryot should re-let the lands for Rs. 600, the under-ryot would make a net profit of Rs. 100, the same amount as was made by the first ryot when he first took the lands. In that case the first ryot would have a net rent of Rs. 300, for he would receive Rs. 600 as a competition rent from the under-ryot, and have to pay only Rs. 300 to the landowner according to the rule of proportion. Thus, instead of being a mere agricultural laborer without capital or property, as he was when he first hired the land 14 years ago, he would become a *quasi* landed-proprietor receiving from the under-ryot a net rent of Rs. 300 equal to the rent of the real landowner.

If any rule of proportion is to be applied as a test of what is fair and equitable, which I deny, the rule, that the ryot's net profit under the new circumstances shall bear the same proportion to the present net value of produce as the former net profit did to the former net value, would be more fair and equitable than the proposed rule of proportion. In that case the new rent would bear the same proportion to the present net value as the former rent did to the former net value.

If the Revenue Settlement had not been made permanent, the Government would, at the next Settlement, after the increase in the value of produce, assuming that it was likely to be permanent, have increased the revenue assessment, and, under the old practice, would have taken two-thirds, or, according to the practice now adopted in the North-Western Provinces, one-half of the net produce. (*See* Directions to Revenue Officers, page 3.) It is there said—"It is needless to enquire who, theoretically, is the owner of the soil. Undoubtedly, traces are often to be found of the existence and exercise of a proprietary right in the land on the part of the individuals. But so long as the Sovereign was entitled to a portion of the produce of land, and there was no fixed limit to that portion, practically the Sovereign was so far the owner of the land as to be able to exclude all other persons from enjoying any portion of the net produce. The first step, therefore, towards the creation of a private proprietary right in the land, was to place such a limit on the demand of the Government as would leave to the proprietors a profit which would constitute a valuable property. This is effected by providing that the assessment shall be a moderate portion, say two-thirds (now one-half) *of the net produce* at the time of Settlement, and that the proprietor should be allowed all the benefits from improved or extended cultivation, which he may be able to obtain during the currency of his lease. This was further effected in most of the districts in the Lower Provinces, by making the Settlement permanent, and declaring the property in the soil to be vested in the landholders."

If the Settlement had not been made permanent, the Government revenue, in the case supposed, of the net value of produce being increased from Rs. 300 to Rs. 700, would, according to the rule of taking half the net produce, have been increased to Rs. 350, and the landowner would have been entitled to receive from the ryot at least half as much again as the Government took from him, and would consequently have been entitled to Rs. 525, *i. e.*, Rs. 350 Government revenue, and one-half as much again, *viz.*, Rs. 175.

The rules which regulate the respective rights of the Government and the landowners, where the settlement has not been made permanent, are shown in paragraphs 135 and 136 of Directions to Settlement Officers:—

"When the Government fixes its own demand upon an estate, *i. e.*, at the time of Settlement, the Government Officer is competent to fix the rates payable by the cultivator to the proprietor. He will be very careful not to do this arbitrarily, but he will refuse to admit the principle that, because a cultivator paid a low rent before the settlement, he is entitled to hold at the same rate, notwithstanding the Government demand has been re-adjusted. As a general rule open to exceptions in special cases, the proprietors should be held entitled to raise the rent upon the cultivator till it *reach half as much again as the average* Government assessment upon land of the same quality.

"When the Government restricts its own demand upon the proprietors, it does not prohibit the proprietors from raising their terms upon the cultivators in such amount as may be equitable during the period of the Settlement. General circumstances affecting the whole Pergunnah, such as the opening of new markets for the produce, the introduction of new articles of produce, *increased facilities* of irrigation, or a fall in the value of money, or circumstances having local effect in the village, such as the establishment of a gunge or haut, the new direction of a road, or the construction by the proprietors of some work for irrigation (and I may add the proximity of a Railway), may all render it equitable that the proprietor should demand an increased rent, though the Government jumma remain the same. The law has made provision for securing this right to the proprietors, fair opportunity having been afforded to the cultivators for contesting their demand."

The rules adopted in the North-Western Provinces, as described in the foregoing paragraphs, are strictly in accordance with the ancient laws of the country, by which (as declared in the preambles of Regulations XIX. and XXXVII. of 1793) the ruling power was entitled to a certain proportion of the *produce* of every beegah of land, and with the established custom or usage by which (as declared in Section 7, Regulation I. of 1793), the Rulers have from time to time demanded an increase of the assessment from the proprietors of land, and for the purpose of obtaining this increase frequent investigations have been made to ascertain *the actual produce* of their estates.

The Government, no doubt, would generally take the rents received by the landowners as the basis of the Revenue assessment, both in the Lower Provinces before the Permanent Settlement, and in the North-Western Provinces since Regulation IX. of 1833, Section 2; but if, when a new Settlement is made, all the rents are too low in consequence of a considerable and permanent rise in prices, it would be necessary for the Collector to ascertain as nearly as possible what might fairly be expected to be the value of the net produce, and to assess the land in one-half the amount. "Net produce" is defined in the Directions to Revenue Officers, paragraph 52, to be "the surplus which the estate will yield after deducting the expenses of cultivation, including the profits of stock and wages of labor."

By the terms of the Permanent Settlement, Government pledged themselves to the zemindars that they were to have the full benefit of the assessments having been made permanent. To hold that the landowners are not fairly and equitably entitled to receive from the ryots since the Permanent Settlement as much as they would have done if the assessment had not been made permanent and the land had been re-assessed, is, in my opinion, to put such a construction upon Act X. of 1859 as to render it a violation of the pledge made by Government to the zemindars at the time of the Permanent Settlement; for there is no doubt in my mind that, to give the landholder the full benefit of that engagement, they ought to be allowed to collect as much from the land, and to enjoy as large a portion of the net produce, without an increase of the assessment, as they would have done if the Settlement had not been made permanent, and the landholders had been re-assessed. In fact, they were to have the full benefit of the assessment being fixed for ever, instead of being subject to have it increased in proportion as the value of the land increased. But how can they get the full benefit of this if they are to be prevented by an Act of the Legislature (and that a retrospective one), or by a construction to be put upon it, from receiving as much from their ryots as they might have done if the assessment had been increased? I have shown that, if the assessment had not been permanent, the landowner, in the case supposed, would have been entitled to recover from the ryots Rs. 525 out of the net produce Rs. 700, *viz.*, the one-half of the Rs. 700 which he would have had to pay to Government as increase of revenue, and half as much more which he would have been entitled to take for himself. This would have left Rs. 175 as net profit to the ryot; in other words, the Government would have taken one-half the net produce from the zemindar as revenue, the zemindar one-fourth in addition to the one-half which he would have had to pay to Government, and the ryot the other one-fourth which would have given him Rs. 175 net profit. Whereas, if the landholder is to be restricted according to the rule of proportion to Rs. 300, being one-third of the gross produce, Rs. 900, he will receive Rs. 50 less than he would have had to pay to Government if the land had been re-assessed to the revenue; and the ryot, instead of getting only one-fourth of the increased value which he would have got if the land had been re-assessed, will get four-sevenths of it, whilst the landowner gets three-sevenths. How then can it be said that the landowner enjoys exclusively the benefit of the public assessments having been fixed for ever,

when the ryot gets four-sevenths, and he gets only three-sevenths of the net increase?

If a zemindar had, by the express terms of a pottah, granted lands to a ryot for 14 years at a certain rent, with an agreement that the ryot should always have a right to occupy at a fair and equitable rent, could it be contended, in construing such a document, that it gave the ryot a right to have his rent always so adjusted as to bear the same proportion to the gross value of the produce for all time as the old rent did to the old gross value? If such a construction would be unreasonable, how can it be right to put the proposed construction upon the words "fair and equitable" in the 5th Section of the Act?

If we go back to early days in search for customary rights, I think we shall fail to discover any custom under which the ryots received as much as one-half or even one-fourth of the net produce after paying all the expenses of production, or that, when a money rent was fixed, a ryot, having a right of occupancy, had a right to prevent the landowner from increasing it beyond the proportion which such money rent, when fixed, bore to the gross value of produce.

Act X. of 1859 applies not only to the permanently settled districts, but also to the North-Western Provinces. If the Sudder Court of Agra should so construe the Act as to apply the rule of proportion, it will probably materially affect the Government revenue at the next Revenue Settlement. If such Settlement is to be made upon the basis of the rights created by Act X., and every ryot who has a right of occupancy, whether existing before that Act or created by it, should be held to have a right to hold at a rent bearing the same proportion to the present gross value of produce as the old rent did to the former gross value of the produce, the landowners cannot be assessed at most at a higher amount of revenue than the amount of rent which, according to the principle of proportion, they are entitled to receive from their ryots. If the landowner is preven by Act X. from raising his rent upon cultivator beyond a certain amount, the Government assess him by incre ing their revenue to an amount up which he will not be entitled to raise rent of his cultivators? But if it sho be held that the fair and marketable va of the land is the rule in the No Western Provinces, how can it, in f ness and justice to the zemindars in permanently settled districts, be s that they are to be bound by the rule proportion? It is the same Act and same words in this respect which are bind and to be construed in the Nor Western Provinces and in the Low Provinces of Bengal. If the rule of p portion is not to prevail in the Nor Western Provinces, where the Gove ment revenue is not fixed, and it oug not in fairness and equity to prevail th if the Government assess according the net value, it ought not to be allow to prevail, and to be the rule in t permanently settled districts where t Government revenue is fixed. In t case now before us, Mr. Justice Cam bell says—"This case has been decid on the principle of dividing the increa ed value equally between the zemind and the ryot, and though in many cas such a decision might be roughly equ able, it cannot be applied in all cases, a is in this case a mere arbitrary guess equity; a more definite rule is required

Mr. Justice Elphinstone Jackson says—"The principle, that the net increase in value of produce is to be divided half and half between the ryot and the zemindar, is in fact no principle at all. It is established on no fair and equitable basis." Such a principle is not, in my opinion, more rough than the principle adopted by Government in the North-Western Provinces in assessing the revenue at half of the net produce, and allowing the landowner to take half as much more from his ryot as he pays to Government for revenue. The principle acted upon in enhancing the rent in this case by the Lower Courts,

was not to enhance in the same proportion as the former rent bore to the former *gross* produce; but it is in my opinion more fair and equitable (if any rule of proportion is to be adopted at all) than a rent assessed in that proportion, for it is, in fact, in precisely the same proportion as, according to the finding of the Lower Courts, the former rent, Re. 1-10 per beegah, bore to the net value, Rs. 34, and at the same time it gives the ryot a net profit bearing the same proportion to the present net value as the former net profit of the ryot bore to the former net value.

The finding was :—

	Per Beegah. Rs.	A.	P.
Former gross produce ...	4	8	0
Expenses of cultivation ...	1	4	0
Net value	3	4	0
Rent	1	10	0
Net profit to ryot	1	10	0

This is more fair in my mind than the rule of proportion proposed to be adopted, without any proof that the rent was originally fixed upon the basis that the gross profits of the land were to be divided according to any such principle.

The rule of proportion clearly was not intended to be applicable to the first ground of enhancement mentioned in Section 17. It seems to me to have been intended that, if the rate paid by a ryot was below the prevailing rate, it might, if considered fair and equitable, be raised to the amount of the prevailing rate. It surely could not have been intended that it might be raised only to such an extent that it might bear the same proportion to the present prevailing rate as the old rent bore to the former prevailing rate.

So as to the third ground of enhancement, that the rent may be enhanced if the quantity of land should be proved by measurement to be greater than the quantity for which rent had been previously paid.

The Act did not mean that, if land should be increased in dimensions by alluvion, the tenant should necessarily pay for the new accretion rent at the same rate or in the same proportion per beegah as for the old cultivated land. If the rule of proportion did not apply to the first and third grounds, why should it be held to be applicable to the second?

If we were entitled to do what is roughly equitable, instead of deciding upon accurate and correct principles, I think the most equitable thing would be to give the landowner three-fourths and the tenant one-fourth of the net increase according to the rule adopted in the North-Western Provinces of giving Government one-half, and allowing the landowner to increase his rents upon his ryots until they amount to half as much again.

It could not be necessary for the protection and welfare of the ryots, and in order to prevent them from being improperly loaded with unwarrantable exactions to pass a law which would prevent a landowner in the permanently settled districts, not only from taking such a proportion of the net produce as a landowner in the North-Western Provinces would be allowed to take, but even to restrict him from taking as much of the net produce as the Government in the North-Western Provinces at present think it fair to take as the Government's share of the net produce. I need not point out the extent of injury which a zemindar will sustain if, throughout his whole zemindary, every ryot, with a right of occupancy, is to be converted into a part proprietor with an interest equal to or even greater than that of the zemindar himself.

To raise the *status* of the ryot, and, instead of leaving him as an agricultural laborer without capital or property, to convert him into a co-proprietor with interests equal to or greater than those of the zemindar, would doubtless be very benevolent if one were to do so at his own expense. But for the Legislature to do so by sacrificing the rights of the zemindar would, as it appears to me,

so far from being fair and equitable, be an act of the greatest injustice.

I cannot therefore think that the words "fair and equitable" ought to receive such a construction as that proposed to be put upon them. Entertaining the opinion which, after much reflection and labor, I have formed in this case, I feel that I should not be justified in yielding that opinion out of deference to those of my learned colleagues. On the contrary, I should consider that I was holding that the Legislature, in passing Act X. of 1859, had violated the engagement which the Government made with the zemindars at the time of the Permanent Settlement, and had exercised a power which Government stated no longer existed, when in Regulation II. of 1793 they declared, in the most emphatic language, that "No power would then exist in this country by which the rights vested in the landholders by the Regulations could be infringed, or the value of the landed property affected; that land must in consequence become the most desirable of all property, and the industry of the people would be directed to those improvements in agriculture which were as essential to their own welfare as to the prosperity of the State."

I answer the first question by stating that I still adhere to the rule laid down in Ishur Ghose's case.

As to the 2nd question—

We are asked, if the customary rate of the neighbourhood has not been adjusted with reference to the increased value of produce, then on what principle is the enhancement of that customary rate to be adjusted?

I confess I do not clearly understand the question. There is considerable confusion in the question, and also in the judgment in which it was propounded, in the use of the words "rate of rent." Sometimes the word "rate" seems to be used as meaning the amount of rent, and sometimes as meaning the standard by which amounts are to be adjusted. The Courts have not the same power as a Collector at the time of making a settlement of fixing the rates payable by all the cultivators in a zemindaree or Pergunnah. If no custom is proved, or no standard proved, the Court cannot make a new custom or a new customary standard. Each case must stand upon its own merits.

If the rule of proportion is to apply, and all ryots of the same class are entitled to be assessed at the same rate for lands of a similar description and with similar advantages in the neighbourhood, they ought all to be assessed at the prevailing ratio of rent to gross value of produce. But, if there is no such prevailing ratio, there cannot be any customary rate of proportion. The rule of proportion adopted *cannot* then depend upon custom.

There is no finding or evidence of any such prevailing ratio, or of any other custom for adjusting the rents.

This, in fact, brings us round to the first question in cases where there is no proof, either direct or presumptive, that the ryot is entitled to have his rent adjusted according to a particular custom, or by a particular standard, or in a particular proportion. In such case, I think, the proper rule for adjusting the rent is that laid down in Ishur Ghose's case.

The old custom, if any could be proved, would probably be found to give the ryots no more than a subsistence; the portion of the gross produce which was formerly allowed to them was not often more than sufficient to pay for their wages as labourers with such amount as was necessary to repay the advances for seed and implements of agriculture. I do not believe that any custom could be found which would give the ryot as much as half of the net value of the produce when the Government used to take half or two-thirds of it for revenue.

Three preliminary objections have been made:—

1st.—As to whether Section 6, Act X. of 1859, applied to cases in which the 12 years' holding was wholly before, or partly before and partly after, the passing of the Act; or whether it extended only to cases in which there should be a holding for 12 years after the passing of the Act.

2nd.—As to whether a landlord could sue for a kubooleut at an enhanced rent without having given a notice of enhancement, as required by Section 13 of the Act.

3rd.—Whether he could sue for a kubooleut without tendering a pottah.

As to the first of these questions, the words "has cultivated or held for a period of 12 years," as used in Section 6, would seem to apply to cases in which the holding was prior to the Act, whereas the words "whether it be held," &c., appear to have reference to the future; but, looking to the preamble and the whole scope and tenor of the Act, I think it was intended by the Legislature that a holding for 12 years, whether wholly before or wholly after, or partly before and partly after, the passing of the Act, should entitle a ryot to a right of occupancy.

As to the second point, I am of opinion that a landholder cannot sue for a kubooleut at an enhanced rent without giving the notice required by Section 13, Act X. In all the cases which were decided as analogous to Ishur Ghose's, some of which were suits for kubooleuts, the notice to enhance was admitted. Section 13 enacts that the ryot shall not be liable to pay a higher rent than the rent payable for the previous year, unless a written notice shall have been served on such ryot in or before the month of Cheyt, specifying the rent to which he will be subject for the ensuing year, and the ground on which an enhancement is claimed. If the ryot is unwilling to pay the enhanced rent, he may give up the land under the provisions of Section 19, which enacts that a ryot who desires to relinquish land held by him shall be at liberty to do so, provided he give notice of his intention in or before the month of Cheyt of the year preceding that in which the relinquishment is to take effect. If he fail to give such notice, and the land be not let to another person, he shall continue liable for the rent of the land. It is admitted, I believe, on all hands, that a suit for a kubooleut at an enhanced rent for the current year in which the suit is brought cannot be maintained, without a notice served in or before the month of Cheyt in the preceding year; but it is contended that the suit for a kubooleut at an enhanced rent, commenced in or before the month of Cheyt in any year, is tantamount to a notice to enhance, provided the kubooleut is not to have effect until after the expiration of the month of Cheyt in the year in which the decree is given. In the present case, the suit was commenced on the 3rd February 1864 before the expiration of the month of Cheyt; it did not ask for a kubooleut for the ensuing year, but simply for a kubooleut; but possibly it must be intended that the plaintiff asked for a kubooleut for the ensuing agricultural year, and that the decree which is general is that a kubooleut is to be granted for the ensuing year at the enhanced rent fixed. But still I am clearly of opinion that the plaintiff had no right before the end of Cheyt in one year to ask for a declaration that he would be entitled to a kubooleut for the next year at an enhanced rent. The decree in such a case could only be on condition that the ryot thinks proper to continue his holding after the end of Cheyt, for he may relinquish his holding under Section 19 if he gives notice of his intention in or before the month of Cheyt.

If such a suit can be commenced in Cheyt, the last month of the agricultural year, to declare the right, to have a kubooleut in the ensuing year, it might also be commenced in Bysack, the first month in the year, or in any intermediate month between Bysack and Cheyt, to declare that the landowner is or rather will be entitled to a kubooleut at an enhanced rent in the

ensuing year. The tenant, if the suit can be so commenced, must either defend it or not. If he does not defend it, the suit may be tried *ex parte* and determined against him. If he defends, he must either incur the expense of employing a Mooktear or Vakeel, or he must waste his time by going to the Court and waiting there till his suit has been heard; and this, if the suit be commenced at a particular time of the year, may drag him away from his home during harvest or seed time.

Would it not be a complete answer to such a suit commenced in Bysack for a kubooleut for the ensuing year to say: "The time has not arrived. I may be dead before next year, or I may think fit to give up possession in Cheyt next, or there may be a drought, and there may be no increase in the value of produce, or of the productive powers of my land; for all I can say now, the value of my produce next year may be *nil.* The suit cannot be determined now."

To decide in May 1865 to what amount the rent for 1866-67 ought to be enhanced in consequence of an increase in the value of produce in order to fix the rent at which a lease for 1866-67 ought to be decreed, would involve the necessity of the Court's proceeding on speculation as to what might be, instead of acting on an existing or past state of facts.

Then, why allow a tenant to be harassed by such speculative action to determine what he may or may not be liable to do next year? Surely, litigation in the Mofussil is harassing enough at present without adding to it by allowing a zemindar in 1864 to commence a suit to declare that he will be entitled to a kubooleut in 1865, if certain events do or do not happen in the meantime.

It has been suggested that, if a zemindar sues for a kubooleut at an enhanced rent, he may enhance without reference to the grounds of enhancement mentioned in Section 17. This point I have already referred to in another part of my judgment.

As to the other point, whether a landowner can sue for a kubooleut at an enhanced rent, without first tendering a pottah.

Such a suit has in substance a twofold aspect: 1st, to enhance the rent, and to declare the rate to which it is liable to enhancement; and, 2nd, for a kubooleut at that rent. I think the suit may be maintained, if notice of enhancement has been given for the purpose of determining the amount to which the rent may be enhanced. A decree in such a suit will have the effect given to it by Section 81, Act X. of 1859, which declares that, if a person who is required by a decree to execute a kubooleut refuse to execute the same, the decree shall be evidence of the amount of rent claimable from him, and that a copy of the decree under the hand and seal of the Collector shall be of the same force as a kubooleut executed by the said person.

The 21st June 1865.

Present:

The Hon'ble C. Steer and W. Morgan, *Judges.*

Limitation—Suit for money improperly charged in Agent's accounts.

Case No. 3274 of 1864 under Act X. of 1859.

Special Appeal from a decision passed by Mr. R. Abercrombie, Judge of Dacca, dated the 19th August 1864, affirming a decision passed by Baboo Chunder Mohun Roy, Deputy Collector of that District, dated the 4th May 1864.

Mr. A. B. Mackintosh (Plaintiff), *Appellant,*

versus

Woomesh Chunder Bose and others (Defendants), *Respondents.*

Mr. A. F. Lingham and *Baboo Motee Lall Mookerjee* for Appellant.

Baboo Bhowanee Churn Dutt for Respondents.

A suit by a zemindar against his agent and the agent's surety for money improperly charged by the Agent in his accounts is barred, if not brought within one year from the rendering of the accounts, which is the time of the accruing of the plaintiff's cause of action.

Mr. Justice Steer.—THIS is a suit by a zemindar against his agent and the security for money received on his account and misappropriated. The suit is brought under Section 24 of Act X. of 1859.

Both Courts have held that the suit is barred.

It is contended in special appeal that the suit is not liable to dismissal, inasmuch as the cause of action must be taken to have arisen on the date when the plaintiff became aware of the fraud of his agent in entering in his accounts a sum as expended in a particular way which was not so expended.

We find that the plaintiff himself admits that his agent rendered an account in which the alleged false payment is entered. The suit should have been brought within one year from the date when the account was rendered, and as it was not brought within that period, the suit is barred.

The special appeal is accordingly dismissed with costs.

Mr. Justice Morgan.—The suit is by a zemindar against his agent and his agent's surety, and it is brought to recover money alleged by the agent to have been paid by him to third persons on the zemindar's account. The plaintiff alleges that no such payments were, in fact, made, and that he is entitled to sue for the money which the defendant has improperly charged in his accounts, notwithstanding that more than one year has elapsed, which in the Lower Courts (under Section 30 of Act X. of 1859) has been held to bar his suit by limitation. If more than one year has elapsed from the date of the accruing of the plaintiff's cause of action, the suit is barred. Assuming that Section 33 of the Act applies to such a case, and that, this being a fraudulent account rendered by the agent, the zemindar may sue within one year from the time when "the fraud shall have been first known" to him, we must still hold that he knows of the fraud when he has the means of knowledge; and these he clearly had when his agent rendered him the accounts containing the items, which accounts were rendered much longer than a year before the institution of the suit.

The 22nd June 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Limitation—Son succeeding father.

Case No. 3362 of 1864 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Mymensing, dated the 30th August 1864, reversing a decision passed by the Deputy Collector of that District, dated the 10th June 1864.

Mohesh Chunder Chowdhry (Plaintiff), *Appellant,*

versus

Buneead Khan and another (Defendants), *Respondents.*

Baboo Poorno Chunder Mookerjee for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

A son has no new cause of action on succeeding to his father. The limitation that bars the father bars the son.

WE find that the appellant's pleader has been arguing a ground not to be found in his written appeal, *viz.*, that the twelve years' limitation of Section 28 of Act X. of 1859 does not apply to him, inasmuch as his cause of action accrued on his succeeding to his father. He had no right to do this; and, moreover, it appears to us that, as father and son are in the eye of the law one, the limitation which bars the father bars the son.

The plaintiff has no new cause of action on succeeding to his father. We dismiss the appeal with costs.

The 22nd June 1865.

Present:

The Hon'ble C. Steer and W. Morgan, *Judges.*

Enhancement—Presumption of uniform payment of rent—Variation of rent—Onus probandi.

Cases Nos. 3332 to 3337 of 1864 under Act X. of 1859.

Special Appeal from a decision passed by Mr. F. B. Simpson, Officiating Judge of Jessore, dated the 22nd August 1864, affirming a decision passed by the Deputy Collector of that District, dated the 17th August 1863.

Hurronath Roy and others (Plaintiffs), *Appellants,*

versus

Chittramoney Dossee and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Obhoy Churn Bose* for Appellants.

Mr. C. Gregory and *Baboos Dwarkanath Mitter, Banee Madhub Banerjee,* and *Aushootosh Dhur* for Respondents.

The fact alone of variations in the amount of rent paid between one year and another does not necessarily establish a right in the plaintiff to enhance, or affect the defendant's right to hold at a fixed rent. It is for the defendant to account for such variation.

THE defendants in this and the other suits, which are before us, claimed protection from enhancement, presenting as their defence that their talook was a dependent talook of the kind mentioned in Section 51 of Regulation VIII. of 1793; and that this was established by uniform payment of rent (*see* Sections 15 and 16 of Act X. of 1859). The judgments of both Courts deal with the evidence of uniformity of payment. For the last twenty years the rent has not been changed. There is documentary evidence of changes in the rent prior to that time; but the conclusions of both Courts seem to be that these are insufficient to entitle the plaintiff to enhance, or to affect the defendant's right to hold his talook at a fixed rent. The talook is an old dependent talook of the time of the Permanent Settlement. The *dowl* shows a rent higher than that which is now, or has been hitherto, paid. The plaintiff, a purchaser at a sale for arrears of revenue, and necessarily, therefore, in great measure, a stranger to the history of the talook, relies mainly on the discrepancy shown by the *dowl* and the subsequent papers between the rates at which the talook was supposed to be held, and the rates in fact paid. The defendants contend that, although their payments have been less than the rates mentioned in the *dowl*, this is explained by a partition of the zemindary, whereby a part of the original talook tarruf Gorhea fell to the share of another sharer in the zemindary, and that the difference between the sum paid by them and the sum mentioned in the *dowl* is to be referred to this cause.

Both the Courts appear to us to have thrown unfairly on the plaintiff the task of explaining this. It was for the defendants who offered this mode of accounting for the discrepancy to give adequate proof and explanation of it. We shall remand the case to enable them to do this, and for a new trial generally. The talook may be, as is contended before us, a talook of the kind mentioned in Section 51 of Regulation VIII. of 1793, and protected from enhancement except upon proof of such matters as therein described. The subsequent partition of the zemindary would, of course, in no way affect or injure the talookdar's right. If they have held their talook at a fixed rent, which has not been changed since the time of the Permanent Settlement, they are clearly protected by Section 15 of Act X. of 1859; and this, notwithstanding the *dowl* or other papers, may show a higher or a different rent. The defendants must, of course, establish this holding at a fixed and specified rent, and if the documentary evidence apparently shows that their holding was at a different rent, it is for them to explain this. We have already said that *they,* and not the plaintiff, should, in the present case, show to the Court's satisfaction how it came to pass that the rent in the *dowl* was not the rent in fact paid. If the Court shall be satisfied that the talook has been always held at a fixed rent, and that the discrepancy between the documentary proof and the other evidence is sufficiently explained, the defendant will be entitled to a decree. The fact alone, that sums were paid in some years less than the payments in other years, or less than the fixed rate, may admit of explanation, and does not necessarily show that the defendant's holding is not a holding at a fixed rate; for the variation may arise from temporary arrangements between the parties, and not from the assertion on one side, or the admission on the

other, of a *right* to vary the terms of the holding.

The case is remanded to the Court of first instance for trial on the evidence already given, and on such evidence as may be further adduced by both parties.

The 26th June 1865.

Present :

The Hon'ble G. Loch and G. Campbell, *Judges.*

Presumption (of uniform payment of rent)—Break of one year in 20 years.

Case No. 3641 of 1864 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Mymensing, dated the 16th September 1864, reversing a decision passed by the Assistant Collector of that District, dated the 21st July 1864.

Tarinee Kant Lahoree Chowdhry (Plaintiff), *Appellant,*

versus

Kalee Mohun Surmah Chowdhry and another (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Sreenath Banerjee* for Appellant.

Mr. A. F. Lingham for Respondents.

The break of one year in 20 is not sufficient to set aside the presumption that the receipts for 19 years prove the payment of a uniform rent.

We do not think that the break of one year in twenty is sufficient to set aside the inference drawn by the Judge, that the receipts for nineteen years prove the uniformity of the rent paid by the defendant. With regard to the objection now taken, that the receipts have not been proved, we find that the first Court rejected them as not proving the payment of a uniform rent, because they did not specify the rate of the rent. There does not appear to have been any contention up to the present time that these documents were not genuine.

In regard to the lands in excess of the area, which defendant admits to be in his possession, we think it unnecessary to remand the case for further enquiry on this point, for the fact of the area in defendant's possession, being now larger than it was heretofore, formed no ground for enhancement in the notice served on the defendant. If the defendant held possession of more lands than he is entitled to, this decision will not prevent the plaintiff bringing an action to recover rent for such excess. The appeal is dismissed with costs.

The 27th June 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Pleaders (grounds of appeal)—Standard of Measurement (Section 11 of Act VI. of 1862, B. C.).

Case No. 557 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 19th December 1864, affirming a decision passed by the Deputy Collector of that District, dated the 28th July 1864.

Mr. J. P. Mackintosh (Defendant), *Appellant,*

versus

Messrs. R. Watson and Co. (Plaintiffs), *Respondents.*

Mr. A. F. Lingham and *Baboo Bhowanee Churn Dutt* for Appellant.

Messrs. R. T. Allan and *J. S. Rochfort* for Respondents.

Pleaders will ordinarily be restricted to their written grounds of appeal, and not allowed to infer separate points from vague generalities.

Under Section 11 of Act VI. of 1862 (B. C.), the standard pole of the Pergunnah is the standard to be used in the measurement of lands, and ought to be assessed either under a kubooleut or otherwise.

Bayley, J.—In this case Mr. Lingham, pleader for the special appellant, states that the pleas which he wishes to urge in special appeal are :—

1stly.—That the Revenue Courts had no jurisdiction.

2ndly.—That the standard of measurement has been wrongly taken by the Judge as the Government standard upon which the opposite party, the farmer, had accepted the Government settlement; whereas the special appellant, as a ryot, had a right, under Section 11 of Act VI. of 1862 (B. C.), to a measurement by the standard pole of the Pergunnah, which was not the same.

3rdly.—That plaintiff should have disclosed and proved his title under Section 4 of Regulation XI. of 1825.

4thly.—That the rates had been improperly adjudged.

5thly.—That a pottah was not tendered.

As these three last grounds are not distinctly taken in the petition of special appeal, we decline to admit them to be argued. There is ample time afforded in 90 days for

a due consideration of what are the proper grounds for a special appeal. Further, a full and proper consideration of the case before the petition is filed is also demanded by the rules requiring the grounds to be duly certified by a qualified pleader; and, therefore, we are not inclined ordinarily to enlarge the opportunities for other pleas by way of afterthought, and see no special reason in this case to make an exception to the above rule of law. Further, it is to be remarked that the law requires the plea to be *distinctly* taken, and, therefore, the argument frequently used, *viz.*, that from indistinct generalities in a petition of special appeal, it may be allowed to infer a separate, distinct, and specific point, is not one which we think either legal or correct.

On the *first* plea of jurisdiction, we remark that the suit is for a kubooleut, and thereby for a determination of certain rents, and it is brought by the admitted farmers, Watson and Co., against the admitted tenant, Mackintosh. We are, therefore, of opinion that there is no defect of jurisdiction in the Revenue Authorities.

On the *next* plea, we consider that the Judge is wrong. His argument is (to use his own words) this: "The Ameen measured the land according to the Government standard, and in this I think that he was right. The estate, which the plaintiff held in farm from Government, was measured by the Government standard, and the farmer has, I consider, a right to measure his ryot's lands by the same standard"—and the Judge adds, the more especially, as the farmer's is a parent and the ryot's a derivative mehal.

Were this a question of expediency for the sake of uniformity of measurement, or was there any law to the effect that, if farmers or zemindars of parent mehals shall have accepted a certain standard of measurement, the holders of derivative or sub-tenures (supposing this to be admitted to be one which it is not) must accept the same, the judgment might be a correct one. But where the law is clear in Section 11 of Act VI. of 1862 (B. C.), that the measurement of such lands as a party may seek to assess either under a kubooleut or otherwise, shall be measured by the standard pole *of the Pergunnah*—that and *that only* must be the standard used. Now, it is not denied before us that there is a difference of two inches per cubit in the standard Government measurement, which the farmers have accepted, and the standard pole of the *Pergunnah* to a measurement by which special appellant contends he is entitled.

The special appeal is, therefore, decreed with costs, and the case is accordingly remanded, in order that the Judge may re-try and re-decide it with reference to the above remarks.

Jackson, J.—I have only to add that, as the question in this case for decision is whether the tenant holds more land than he was entitled to under his original contract, the standard by which the land was measured when his contract was given to him has first to be ascertained. The plaintiff states that the defendants' land has been largely increased by accretions. He cannot point out the exact extent of these accretions; but he proposes to prove that there have been such accretions by measuring the whole land. He must then, to prove this by whatever rod the actual measurement is carried out, reduce his figures to the rod by which the extent of land originally made over to defendant was measured. If that extent of land was ascertained by the Government rod, the question, as to whether there has been an increase or not, will depend on a calculation made with that rod. If it was ascertained by the Pergunnah pole, then the question will depend on the calculation made by that pole. The plaintiff must satisfy the Court that there has been that increase in the extent of the land upon which he claims enhanced rent.

The 28th June 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Enhancement—Notice (production of copy of, not always necessary)—Trial to be restricted to specific cause of action—Abatement (not pleaded by defendant).

Cases Nos. 703 and 924 of 1865 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Purneah, dated the 23rd December 1864, affirming a decision passed by the Deputy Collector of that District, dated the 30th July 1864.

Reazoonissa and others (Plaintiffs), *Appellants,*

versus

Oomun and others (Defendants), *Respondents.*

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Messrs. C. Gregory and *J. Baptist* for Appellants.

No one for Respondents.

In a suit for enhancement upon a specified ground, this is the sole point to be tried.

If, in such a suit, the defendant does not ask for an abatement for diminished area, the Court cannot refer to it.

It is not always requisite to produce a copy of a notice to enhance.

THESE two cases, it is stated by special appellant's pleader, must be governed by one and the same decision.

Plaintiff sued for enhancement of rent upon the ground that the productive powers of defendant's land had been increased in consequence of an embankment which had been erected by plaintiff.

Defendant's answer apparently was, that his lands had been before measured, and the locally prevailing rates had been enquired into by a Court Ameen in the presence of plaintiff's amlahs, and that thereupon a decree had been given by the Deputy Collector, fixing defendant's jumma at Rupees 38-5-11 per annum.

The first Court held that such decree was final as to the question of enhancement; but for a certain sum as to which defendant specially pleaded payment and failed to prove it, the first Court gave plaintiff a decree.

On appeal, the Lower Appellate Court has recorded the following judgment, which it is necessary for the purpose of this appeal to cite *in full*. It is as follows :—

"The Deputy Collector's decision of 1861 "would not bar this claim had the plaintiff "submitted the durbundee of the village "properly attested, and showed that plaintiff "was paying rent at a lesser rate than that "current in the mouzah. Beyond filing a "*wasil-bakee*, he has submitted no proof, "and not even a copy of the notice showing "the ground of enhancement. The area "held by the defendant appears rather less "than that which he formerly cultivated. "Accordingly, I affirm the Deputy Collect-"or's decision, and dismiss this appeal with "costs."

Plaintiff appeals specially, urging :—

1st.—That such a decision as the above in no way adjudicates the points raised by the pleadings.

2ndly.—That the law requires plaintiff to serve the notice through the Collector, and, consequently, it was not necessary for plaintiff to keep and produce a copy of the notice.

3rdly.—That the durbundee or local rate statement would not be conclusive in the present case.

4thly.—That plaintiff sued upon a specific cause of action, *viz.*, increase of productive powers of land by means of an embankment made by plaintiff's agency, and gave his notice accordingly; and that, although that was the point to be tried, it was not tried, and, from its very nature it was one which could not be decided solely by another decree passed on pleas other than those raised here to support the right to enhance.

5thly.—That the defendant did not raise a plea of abatement for diminished area, and so the Lower Appellate Court should not have referred to that point.

We consider each and all of these objections valid; and we accordingly decree this appeal, and remand the case for re-trial with reference to the above remarks.

The judgment of the Lower Appellate Court in No. 924 is to the same effect as in 703, and requires no separate remarks. Both cases are remanded accordingly.

The 29th June 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Right of occupancy (not affected by change of farmers)—Evidence of village custom as to rates of rent.

Case No. 3264 of 1864 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Bhaugulpore, dated the 15th August 1864, reversing a decision passed by the Deputy Collector of that District, dated the 27th February 1864.

Sheo Churn Singh (Defendant), *Appellant,*

versus

Gora Chand Ghose (Plaintiff), *Respondent.*

Baboo Debendro Narain Bose for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

A right of occupancy under Section 6, Act X. of 1859, is not affected by a mere change in the farmers.

What evidence is necessary to prove the current custom of a village as to rates of rent.

THE plaintiff sued defendant for a kubooleut at an enhanced rate on 27 beegahs of land. He alleges that the one rupee paid is below the prevailing rate payable by the

same class of ryots for lands of a similar description and with similar advantages in the places adjacent, and that the rate which plaintiff should pay is Rupees 5-1.

The first Court held that defendant was a tenant with a right of occupancy, and that his present rent represented the rent paid by similar ryots for similar lands in places adjacent, and dismissed the plaintiff's claim.

The Judge, on appeal by the plaintiff, held that, although the defendant had held his land for more than twelve years, still, as the farmers had during that period been changed, a right under Section 6 had not been acquired by plaintiff, and that, not being a ryot with a right of occupancy, the plaintiff is entitled to the rate he claims, he having clearly proved that other ryots have agreed to pay those rates.

Defendant now appeals specially, urging—*1st*, that the Judge is wrong in holding that a right of occupancy under Section 6 of Act X. of 1859 could not be acquired under two separate farmers; that, as they both represent the zemindar, they are in the eye of the law one and the same person; and that his possession for more than twelve years under them gives him a right of occupancy; and, *2ndly*, that, having a right of occupancy, he is, on plaintiff's allegation, liable only to pay what similar tenants pay for similar lands in places adjacent; that six kubooleuts of other tenants manufactured for the occasion are not legally evidence of a nature to prove the custom of the particular locality, but that the case should be remitted in order that a proper enquiry with legal evidence be taken.

On the *first* objection there can be no doubt. The mere change of the farmer cannot prevent the running of the time required by Section 6 of Act X. to give a right of occupancy. On the *second* point, we would observe that it is difficult to define what evidence is necessary to prove the current custom of a village as to rates of rent; but it is quite clear that the kubooleuts of six ryots, evidently prepared for the occasion, and under which the rent has never been collected, are no legal evidence to prove the custom of a village in the matter of rates of rent of ryots with a right of occupancy. To prove this, the Judge must require from plaintiff good evidence, both documentary and oral, of what is the general rate in the locality. We remit the case to the Judge, who will call for such evidence, and pass whatever orders seem conformable with justice.

The 29th June 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Enhancement of rent of tenants-at-will.

Case No. 2240 of 1864 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Additional Judge of Nuddea, dated the 16th May 1864, reversing a decision passed by the Deputy Collector of that District, dated the 28th February 1864.

Koobir Sirdar and another (Defendants), *Appellants,*

versus

Goluck Chunder Chuckerbutty and another (Plaintiffs), *Respondents.*

Baboo Debendro Narain Bose for Appellants.

Baboo Bhuggobutty Churn Ghose for Respondents.

A zemindar is not bound by the ground of enhancement mentioned in his notice in the case of a tenant-at-will. Nor has the tenant any right to claim the prevailing rate, but is liable, after notice of enhancement, to the highest rack-rent.

THIS is a suit for an enhanced rent after notice. It is found and admitted that the defendant has no right of occupancy. But, in special appeal, defendant urges that, as he has not been ejected, plaintiff can only obtain an enhanced rent on proving the ground of enhancement mentioned in his notice, or, at any rate, that he must be restricted to the prevailing rate. We think that, in the case of a *tenant-at-will*, the grounds on which notice of enhancement was given are mere superfluity. The tenant must *either* pay or go. Nor has he any right to claim the prevailing rate. The doctrine alluded to by the Judge on the authority of a decision which we have not found in the reports, that, if the landlord does not elect to eject, he can only claim an equitable rent, cannot properly be carried beyond this, that in such a case the landlord cannot claim more than the land can possibly and reasonably bear. Up to the highest rack-rent, which the land can in any way bear, the tenant who holds on after notice of enhancement is liable. In this case the Judge has reduced the plaintiff's demand, and the plaintiff has not appealed. Defendant appeals against the award of Rupees 2-8 per beegah for Bastoo and village land, a rate which the Judge finds to

be not unreasonable, and which is not unreasonable. We dismiss the appeal with costs.

The 29th June 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Sale of Zemindary rights by Government—Pergunnah Baldakhal—Rights and position of Under-tenures—Enhancement.

Case No. 410 of 1864 under Act X. of 1859.

Regular Appeal from a decision passed by the Deputy Collector of Tipperah, dated the 14th July 1864.

Musst. Burnee Khanum and another (Plaintiffs), *Appellants,*

versus

Modhoo Soodun Doss and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Dwarkanath Mitter* for Appellants.

Messrs. R. V. Doyne and *R. T. Allan* and *Baboo Onocool Chunder Mookerjee* for Respondents.

Suit laid at Rupees 8,525.

The Government purchased the zemindary rights in a certain property sold for arrears of revenue, and, though it had the power, under the law in force, to dispossess the plaintiffs, who were holders of a talook created since the Decennial Settlement, and to avoid and annul their under-tenure, the Government waived its rights of cancelment and ejectment, and by its proceedings virtually re-admitted the plaintiffs to their old rights. The Government then sold its zemindary rights to the defendant, guaranteeing the rights and position of the plaintiffs. HELD that the defendant was bound by the acts of the Government; and that the plaintiffs were entitled to recover possession under Clause 6, Section 23 of Act X. of 1859. HELD also that the defendant was at liberty to sue for enhanced rents under Clause 1.

THIS is a case exactly similar to case No. 361 of 1864, Obhoy Chunder Roy *versus* Khaja Assanoollah, and to case No. 408 of 1864, Ram Mohun Shaha *versus* Hurree Kishoree Adhikaree. It relates to a certain dependant talook in Pergunnah Buldhakhal, of which Pergunnah the zemindary rights were purchased by Government in 1835 and 1836 at a sale for arrears of revenue. Eventually, the right of Government so acquired was sold to the present defendants in the year 1863. The plaintiffs are the owners of a dependant talook within the said Pergunnah, and they sue to recover possession of the same, having been ousted, as they allege, by the act of the defendants who collected rents from their ryots; and their main allegation is, that Government sold the zemindary rights with a reservation of the plaintiff's talookdaree rights in their favor; and that they are consequently entitled to recover that possession which they have always held under various settlements from Government ever since its purchase. The talooks within this estate were originally created subsequent to the Perpetual Settlement, with the exception of 31 created previous to that event. The number of those created subsequently was more than four hundred.

Under ordinary circumstances, the case being on all fours with those previously decided by us with reference to other talooks within Pergunnah Buldhakal, we should have given a decree in the plaintiff's favor, and have reversed the decision of the Deputy Collector. But Mr. Doyne, for the respondents, intimated that, on the last occasion, the documents proceeding from the Revenue Authorities, which bore on this case, had not been laid before the Court in all their fullness, and that he wished to argue the case. The appeal has, therefore, been very fully discussed.

The defendant, purchaser from Government of its zemindary rights, has all along maintained that, at the time of his purchase, the plaintiff was already out of possession, inasmuch as the Government had been making *khas* collections for some months; that the plaintiff's talookdaree rights were annihilated on the 11th of March 1836, or when the Government purchased the Pergunnah; and that, though they may have held, or been admitted to temporary leases since that period, they have never received their original talookdaree tenures.

The documents noted in the margin have been largely quoted from or appealed to in the course of argument.

Board to Collector, 21st December 1835.
Ditto to Commr., 21st December 1835.
Commissioner to Board, 13th June 1836.
Board to Commr., 15th February 1836.
Collector to Commr., 5th August 1862.
Prodg. of Depy. Collr., 19th June 1837.
Commr. to Collector, 3rd September 1839.
Prodg. of Depy. Collr., 11th March 1836.
Collr. to Depy., Collr., 31st Dec. 1840.
Notice of Collector, 1st March 1844.

The pleader for the appellant at first simply rested his case on the similar decision of our Bench in the case of Obhoy Chunder Roy *versus* Assanoollah; but the case was afterwards thoroughly argued on both sides, and all the documents which could throw any additional light on the point at issue were inspected and commented on.

Mr. Doyne attempted to lay some stress on the fact that no charge of any positive

act of ejectment is brought by the plaintiff against the defendant, who is merely charged with having adopted the acts and position of Government, and with keeping the plaintiff out of possession. This, it was contended, seemed to show that the plaintiff had no right to sue the defendant under Clause 6 of Section 23 of Act X. of 1859, as he, plaintiff, had not been ejected from the occupancy or possession of his tenure by the person legally entitled to receive rent from the same.

This plea, we think, is untenable. The defendant has deliberately adopted the acts of Government, whatever they may amount to; and there has, no doubt, been a constructive ejectment on his part of the plaintiff. If the plaintiffs were not at liberty to seek re-possession of their tenure from the defendant, and to have their rights judicially put in issue, it is very difficult to see to what remedy they would be left. One other objection was at first also taken by Mr. Doyne as to the right of defendant to demand enhanced rents from the plaintiffs, should the latter be held entitled to recover possession, which objection will be noticed hereafter.

The Government, we have seen, purchased the zemindary rights in certain shares of this Pergunnah at two sales for arrears of revenue: one on the 19th January 1835, and the other on the 5th of May 1836. We find from the letters of the various Revenue Authorities that, after sundry ineffectual plans had been tried for the management of this extensive estate as Government property, the Collector was specially deputed to invite the talookdars to come to terms, and to consent to a somewhat enhanced jumma. We may at once declare it as our opinion that the proceedings show, by reference to the law on the question in force at the time, Regulation XXII. of 1822, that the Government had full power "to avoid and annul" all the under-tenures existing in the estate at the time of sale and created subsequent to the settlement. This point was particularly enlarged on in the letter from the Board to the Commissioner, of the 15th of February 1836, paras. 51 to 58, and there seems reason to think that the views of the Board as to the rights of Government were substantially correct under the law. Regulation XI. of 1822, under which the Pergunnah became the property of Government. It seems unnecessary for us to discuss the bearing and scope of the various laws of 1793, 1799, and 1812, because we have admittedly to deal with the law 1822, and it was to this law that the Bo in 1836, specially directed the attention of the Collector as bearing on the rights of these talookdars, and it is by this law that their rights stood or fell. The Board further lay it down as unquestionable, that the Government, as purchaser of the estate, had a right to dispossess all such persons as held talooks created since the Decennial Settlement, of which the plaintiff in the present case is admittedly one; but the Board considered them all to have a claim to equitable consideration, "because (para. 53) their tenures were acquired at a time between 1817 "and 1822, when, under the law, as it was "then understood, they were led to look on "their right of possession as fixed and permanent, notwithstanding a sale for arrears." Then the Board go on to say (para. 54) that, in order to prevent combination, and to protect the dues of Government "in allowing "them, on the ground of equitable indulgence, "the benefit of the law, as it stood in practice prior to the passing of Regulation XI. "of 1822, it is not more than fair to hold "them liable as they would at that time have "been, under Clause 5 of Section 29 of Regulation VIII. of 1799, to ejectment from "their lands, should they persist in declining "a renewal of engagements on proper terms." The Board, after stating that talookdars created after the Decennial Settlement could not be allowed to hold at fixed jummas, go on to say that the ryots were to be warned not to pay receipts to these talookdars; and that the talookdars themselves were to be informed that Government offered them the acceptance of engagements at equitable jummas (para. 57), "if they come forward "within *one month*, counting from the date "on which Mr. Alexander (the Collector) "may have served on each party, in the "prescribed manner, the notice directed "in para. 5 of the instructions of the 21st "of December last; but *that, in default of "their so coming forward within the "time limited*, the collections from their "lands will be held *khas* or be let in farm, "as may be thought expedient, and their "right of terms in their talooks will be "considered to have entirely lapsed." The Collector was then told (para. 58) to invite tenders for engagements from other persons, should the talookdars not so consent within the prescribed time.

That the talookdars did not so consent; that they entered into a determined combination to defeat the object of Government in raising the jummas of these talooks; that they held all the officials at arm's length for a

series of years—is abundantly clear from the proceedings filed in this case. It may readily be conceded to Mr. Doyne that, in the strict letter of the law, and in the view taken of the whole case by the highest Revenue Authorities, the talooks in question might, after lapse and annulment, have been settled with other parties had any such been found. But the question after all then would be, did Government avail itself of its unquestionable rights of avoidance and annulment and of settlement of the talooks with other persons willing to consent to an equitable, *i. e.*, an enhanced jumma?

We find from the letter of the Commissioner to the Collector of the 3rd of September 1839 that nothing had been finally decided, and that the Collector was informed that these talookdars were to be admitted to engagements favorable to them for 20 years; and that they would have the option of a re-settlement if they fulfilled their engagements into which it was then expected that they would enter. It is clear from this, that the two parties, the Collector and the talookdar, were still skirmishing, and not come to terms.

Stress is then laid by the respondent on the proceeding of the Collector, Mr. Metcalfe, of the 31st of December 1840, in which it was stated that notice was to be given to three distinct sets of persons to come in and agree to settlements for 20 years: *1st*, putnee-talookdars, such as the plaintiffs, for this was the inappropriate term by which they were designated; *2ndly*, *khanabaridaran*, or separate homesteads; and, *3rdly*, khoodkasht ryots; and the Collector stated that, if they did not come to terms, settlements would be made with others. Things appear to have gone on undetermined, and in this peculiar fashion, until the 8th of May 1845, when we find a pottah given to the plaintiffs making a settlement with them for ten years, but antedating the engagement as far back as 1841. The settlement was again renewed for ten years, and lastly for one year, at the expiration of which latter period the zemindary rights were sold by Government to the defendants, with the general reservation of the rights of the talookdars already noticed in the other appeals, to the effect that only the zemindary rights were sold, and that the rights of the talookdars, "whatever they were," would be respected.

The main contention, then, on the above pleadings, has reference to the precise position and rights of the talookdars from the period when they did at last come to terms with the Revenue Officials, and when they were admitted to settlement. Nothing definite or express in their favor is to be discovered in the pottah by which an engagement was at last concluded. It is an ordinary pottah, like so many others given to under-tenants or even ryots. Mr. Doyne contends that the old tenure or talookdaree right was not revived by this act of settlement; that the old rights had become null and void: first by the sale, and then by the determined recusancy of the talookdars; that we cannot import into the pottahs, now relied on, any terms or stipulations not expressly mentioned there; and that the talookdars, being out of possession when his client purchased, are clearly to be treated like any other persons who had come to the end of their temporary engagement, and who have no rights at all.

The respondent, on the other hand, dwells on the fact that, after all, no new engagements were concluded with third parties; that the talookdars, and no other persons, were finally admitted to settlement; and that, by this admission, Government virtually waived its rights; that the talookdars were termed putnee-talookdars in the intent that, on default, their tenures might be sold under the law applicable to real putnee-talooks; and that in this way their *status* as dependant talookdars, and not as mere ijaradars, was recognized; and that, finally, the Government sold nothing but its zemindary rights, and guaranteeed, though in general language and without particular specification, the rights and position of his clients.

It seems to us, after very full consideration, that the plaintiffs can recover, if it be shown that Government had waived its rights of cancelment, and possibly of ejectment, and had, by its proceedings, virtually re-admitted these talookdars to their old *status* and rights; and that, Government having thus condoned or ceased to insist on that recusancy of their under-tenants, it is not competent to a third party to put the old threats into force, or to revive the order of cancelment and ejectment, directed at the talookdars in the event of their obstinacy in 1836.

We feel indisposed to admit the respondent's contention that he is entitled to recover even under the strictest interpretation of the Sale Law of 1822, or that the use of the term putneedars put his clients in the *exact* position of those well-known tenants in the eye of the law.

On the other hand, we fully admit the vexatious and determined resistance to the Collector offered by these talookdars, including the plaintiffs. The pleader for the respondents is unable to show us that any settlement took place with his clients before 1845, and even then the lease was, for some reasons not explained to the Court, allowed to have effect from 1841; nor can we have any doubt that the Collector must have been collecting rents, as best he could, from the ryots under *khas tahsil*, thwarted probably in this attempt, and baffled in endeavours to make settlements with others during the period which elapsed between 1836 and 1841. It is perhaps to be regretted that, when re-admitted, nothing particular was laid down as to the *status* of the parties; and that when their rights, whatever they were, were finally 'reserved' at the sale of the zemindary to the defendant, the Government, which was in a position to explain its own acts and intents, did not state in what light it regarded, or to what *status* it had re-admitted, these numerous dependant talookdars.

We are pressed not to import into the deed of settlement with the talookdars any terms or recognition of rights not to be expressly found there. But we own that we are disposed to look to the effect of the whole of the acts of Government, and to put a fair and a liberal construction on those acts. Admitting again and again the obstinacy and recusancy of the talookdars, we consider, after all, that they only evinced that spirit which natives in such positions always do evince, *viz.*, a dislike to submit to enhanced rent, which was the avowed aim and object of the Commissioner and Board, for ejectment seems not to have been contemplated. The Commissioner wanted a jumma of Rs. 5,000 in one instance, and this the talookdars, not unnaturally, objected to pay. And we think that the simplicity of the terms of the pottah is to be construed by a reference to a desire, on the part of the Collector, not to guarantee to them any fixity of rent, and to no other motive. After all, this is not the first time we have heard of a *brutum fulmen* in the shape of threat of cancelment and annulment, if terms are not come to within a month, or fifteen days, and not the first time that parties have been finally admitted to the settlement which they first refused. And when we find the officials driven to a compromise as they, no doubt, were; not engaging with third parties, reinstating these very talookdars, settling with them not once, but twice, and thrice, terming them putneedars, and not making any allusion to past delinquency and misconduct, we can come to no other conclusion than that Government had condoned their acts, and had reinstated them in their original places as dependant talookdars, with the indulgence contemplated in the first proceedings of 1836, and with entire oblivion of all their acts of combination, opposition, and recusancy.

There would, then, seem to us no reason why our decision should not be the same as in the former case of Obhoy Chand *versus* Assanoollah. The case, on this occasion, has been most fully argued, and all the documents have been produced and perused *in extenso;* but we do not think that any new view of the case has been opened, though we grant that much more light has been shed on the view which we took on the former appeal, which is the real view of the matter. In this view it would seem unnecessary to decide whether, under the strictest interpretation of the law of 1822, and without consideration of the acts of the Government, the talookdars could recover. But the mere length of time during which they have been permitted to re-engage should not be lost sight of, when considering their claims to an equitable interpretation of the words and acts of Government.

Admitting, then, the plaintiff's right to re-possession, and that the acts and waivers of the Government are binding on the purchaser, there still remains the point noticed by Mr. Doyne, *viz.*, the right of his client to enhance. On this head, we think that the defendant should be allowed to sue under Clause 1, Section 23 of Act X., and that he is still at liberty to adopt this course, for nothing in any decision has been said as to the rate of rent, or as to the right of the plaintiff to hold at a fixed and certain rent. This point is still open. If the defendant should lose his enhanced rent to which he thinks himself entitled for one year or more, that is an accident which cannot be helped. It is simply one of the chances of litigation to which every man must submit. We cannot in this decision say at what rate of rent the talookdar, on his re-admission, is to be entitled to hold, or what terms the purchaser from Government may or may not exact.

Holding these views, after the fullest consideration, we decree the appeal for re-possession, with all costs in the appellant's favor.

The 28th June 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Limitation (Section 92 of Act X. of 1859)—Process of Execution.

Case No. 125 of 1865 under Act X. of 1859.

Miscellaneous Appeal from an order passed by the Judge of Mymensingh, dated the 21st December 1864, affirming an order passed by the Deputy Collector of that District, dated the 22nd July 1864.

Prosunno Coomar Surma Chowdhry and others (Decree-holders), *Appellants,*

versus

Ram Mohun Sircar and others (Judgment-debtors), *Respondents.*

Baboos Baneenath Bose and *Poorno Chunder Mookerjee* for Appellants.

No one for Respondents.

Under Section 92 of Act X. of 1859, no process of execution can issue after the lapse of three years from the date of judgment, unless for a sum exceeding Rs. 500.

THE appellant in this case obtained an *ex-parte* decree for arrears of rent under the provisions of Act X. of 1859. He appears to have allowed more than two years to elapse before he took out execution against the moveable property of his judgment-debtors. His decree was not satisfied by sale of the personals; and, instead of making a timely application under Section 109 of the aforesaid Act for execution against any immoveable property belonging to his debtors, he allowed more than three years to elapse from date of the original decree to date of his present application for execution against the immoveable property of his judgment-debtors.

The Judge has held that, under the provisions of Section 92 of Act X. of 1859, the application is beyond time, and that no process of execution can be issued.

We think that the Judge is right. It has been ruled by this Court that Act X. is a Code of itself, and that all questions of limitation arising in cases instituted under the Act must be governed by the special provisions of the Act.

Section 92 is clear in its terms. It enacts that no process of execution of any description whatsoever shall be issued under Act X. after the lapse of three years from date of judgment, unless the judgment be for a sum exceeding Rs. 500. It is admitted by the appellant's pleader that the judgment is in this instance for a sum less than Rs. 500. The Legislature clearly intended that ryots were not to be harassed by protracted litigation in the execution stage; and as the appellant by his own laches lost the remedy, which the law gives under Section 109 of the Act, we fail to see any hardship in his case.

Appeal dismissed without costs, as nobody appears for the opposite party.

The 30th June 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Partial decree (for portion of suit not barred).

Case No. 587 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of East Burdwan, dated the 29th September 1864, affirming a decision passed by the Collector of that District, dated the 1st July 1864.

Nobokishen Mookerjee (Plaintiff), *Appellant,*

versus

Gopal Shamunt (Defendant), *Respondent.*

Baboos Tarrucknath Sein and *Dwarkanath Mitter* for Appellant.

No one for Respondent.

Although part of a claim may be barred by limitation, a partial decree may be given for the portion not barred.

THIS special appeal is against so much of the order of the Lower Appellate Court as states: "The greater part of the plaintiff's "claim being barred, I do not deem it right "to decree any part in this case."

This order is, we think, obviously wrong. There is no law to warrant a refusal to investigate and decide part of a claim, because another part is barred. A partial decree might quite legally have been given *in this case* for such portion as was not barred.

Remand for re-trial with reference to the above remarks.

The 5th July 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Presumption of uniform payment from Permanent Settlement—Variation of rate of rent not affecting total jumma.

Case No. 222 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated the 12th September 1864, reversing a decision passed by the Deputy Collector of that District, dated the 12th March 1864.

Gopal Chunder Bose (Defendant), *Appellant,*

versus

Muthoor Mohun Banerjee and others (Plaintiffs), *Respondents.*

Baboos Mohender Lall Shome and *Onoocool Chunder Mookerjee* for Appellant.

No one for Respondents.

A variation in the rate of rent which does not affect the integrity of the jumma does not rebut the presumption of a holding at a fixed rent from the Permanent Settlement.

THIS was a suit for enhancement of rent. The Deputy Collector found that, from the document filed by the ryot, and the admissions of the plaintiff's agent who was examined, it was clear that the defendant, the ryot, had held the land at an unvaried rate for more than 20 years; and further that, as the presumption of such holding from the date of the Perpetual Settlement had not been rebutted by any evidence adduced by the plaintiff, the ryot was protected under Sections 3 and 4 of Act X. of 1859.

In appeal, the Judge, while admitting the long occupancy of the ryot at a uniform rate, observes that a decision of the 2nd of June 1831 shows that, in a suit to which the father of the defendant was a party, the rent had been varied, and, therefore, the presumption which Sections 3 and 4 give rise to in favor of the ryot were rebutted by a decision of date subsequent to the Perpetual Settlement.

Undoubtedly, if the integrity of the jumma of the whole tenure had been affected by this decision of the Judge, we should have had no hesitation in agreeing with him; but this decision leaves the whole jumma intact; a division amongst the first tenants, who then were proprietors of the tenure, led to a certain area being given to one, and a certain area to another. The rate of the jumma of the aliquot parts was not in proportion to the whole jumma; but, the whole jumma remaining the same and unaffected, the presumption which the ryot can claim has not been rebutted by the zemindar. The decision of the Judge is reversed, and that of the Deputy Collector confirmed, without costs and interest.

The 5th July 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Assessment of rent—Tanks.

Case No. 234 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by Mr. G. C. Fletcher, Judge of Burdwan, dated the 14th September 1864, reversing a decision passed by the Deputy Collector of that District, dated the 22nd January 1864.

Ram Churn Banerjee (Plaintiff), *Appellant,*

versus

Kisto Deegar and others (Defendants), *Respondents.*

Baboos Banee Madhub Banerjee and *Bama Churn Banerjee* for Appellant.

Mr. R. E. Twidale for Respondents.

A fair and equitable rate of rent for tanks should be assessed independently of the acts of Government.

THE Deputy Collector, in a suit for assessment, found that one rupee per beegah was a fair and equitable rate for tanks. This rate was fixed with reference to adjacent rates.

The Judge, finding that the Government in resumption cases, as a boon to the lakherajdar, fixed 2 annas per beegah for tanks, was of opinion that double that rate, or 4 annas, must be fair and equitable. The decision of the Deputy Collector was amended.

We think that the special appellant is not bound by the rates which the Government, in the exercise of its prerogative of showing mercy to the lakherajdar, has thought proper to accept. The Judge must find what is a fair and equitable rate for tanks independently of the acts of Government. Case remanded to the Judge for this purpose.

The 5th July 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Evidence.

Case No. 214 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 28th September 1864, reversing a decision passed by the Deputy Collector of that District, dated the 6th June 1864.

Mokeem Tandal (Defendant), *Appellant,*

versus

Nawab Syed Ali Ahmed (Plaintiff), *Respondent.*

Baboos Dwarkanath Mitter and *Unnodapershad Banerjee* for Appellant.

Baboos Baneenath Bose and *Chunder Kally Ghose* for Respondent.

Suit for kubooleut at an enhanced rent. On remand by the Judge to try the genuineness of the pottahs, pleaded by the defendant, the first Court decided that the pottahs were genuine, without receiving the evidence tendered on that behalf by the defendant. The Judge reversed the decision of the first Court, and gave the plaintiff a decree. HELD that the Judge, if dissatisfied with the reasoning of the first Court, ought to have given the defendant an opportunity of adducing the additional proof tendered to the first Court.

THIS was a suit for a kubooleut from the defendant, special appellant, enhancing the rent from Rs. 89-12 to Rs. 1,148 on an area of 28 beegahs 14 cottahs. The land in dispute is situated in Chitpore, and is doubtless valuable.

The defendant pleaded two pottahs, and it seems to be admitted that, if these instruments be genuine, the tenure is protected from enhancement.

The Judge of the 24-Pergunnahs, when the case first came before him in appeal, remanded it to the Deputy Collector to take further evidence as to the genuineness of the pottahs.

The Deputy Collector, Mr. C. B. Garrett, though evidence was tendered by the special appellant, refused to receive it, and decided that the pottahs were genuine, because they had been filed in three different suits to which special respondent was a party, and had passed unimpugned by him. The Judge held that these three suits were connected with the present litigation, and that the genuineness of the pottahs was not strictly in issue in these suits. The Judge reversed the decision of the Deputy Collector, and gave the plaintiff a decree for the whole amount asked for—defendant to execute a kubooleut.

In special appeal, it is contended that the Judge, if dissatisfied with the reasoning of the Deputy Collector, should have given the special appellant an opportunity of adducing the additional proof which was tendered to the Deputy Collector, and we think that the special appellant is clearly entitled to do so, more particularly as the object of the remand order was to give him an opportunity of proving the pottahs. We remand the case. The Judge will give the special appellant every opportunity of proving his title clear, and for this purpose the suit must be remitted to the Court of first instance.

The 5th July 1865.

Present :

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Presumption of uniform payment from Permanent Settlement.

Case No. 684 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated the 9th December 1864, affirming a decision passed by the Deputy Collector of that District, dated the 20th July 1864.

Jugmohun Doss (Defendant), *Appellant,*

versus

Poornoo Chunder Roy (Plaintiff), *Respondent.*

Baboos Khetternath Bose and *Issur Chunder Chuckerbutty* for Appellant.

Baboo Opendur Chunder Bose for Respondent.

Section 4 of Act X. of 1859 does not require that, in a suit for enhancement, the ryot should specifically claim to hold from the time of the Permanent Settlement in order to obtain the benefit of the presumption enacted by that Section.

THE plaintiff sued to enhance, after notice, on the ground of an increase in the productive powers, and also in the value of the produce of the lands held by the defendant (special appellant) without the defendant's expense or agency.

The statement on oath of the defendant, when examined, was that his tenure was one of old standing, the rent of which could not be increased, and that he and his father had held the lands for more than 70 years at a

rent of Re. 1-9; that his father had purchased this holding from one Tarachand, to whom it belonged as his jote, and that the lands were *grass* lands when they were purchased.

The special appellant alleges that the lands have been, at considerable expense and labor, raised and converted into a garden. The plaintiff appears to admit the last fact, but pleads that defendant has not incurred any expense.

The Court of first instance, among other issues, framed this, whether the defendant is protected from enhancement under Section 4 of Act X. of 1859; and the Court held that, though the payment of a uniform rent (for 32 years) was established by the defendant, yet the presumption was rebutted by the evidence produced by the plaintiff, which showed that the tenure was created subsequent to 1214 B. E. The Court further found that the lands had been converted into a garden at the expense of the ryot from "waste arable" lands, and decreed enhancement at the prevailing rate for the best "*soona*" land, and not at the rate for garden lands.

From this decision the defendant appealed to the Lower Appellate Court, which held that, as the defendant had not pleaded that his land was held at a uniform rate from the time of the Permanent Settlement, and had not proved it, therefore the presumption from twenty years' payment, referred to in the 4th Section of Act X. of 1859, did not arise; that the defendant had failed to prove that the lands were grass lands when they were purchased; and that, though the *plaintiff's* witnesses proved that the productive powers of the land had increased by the agency of the defendant, yet, as the defendant did not plead this, he could not take advantage of the testimony of those witnesses. The Court then dismissed the appeal of the defendant without disturbing the rates decreed by the first Court, remarking that, "when the "witnesses before the Ameen proved that the "neighbouring rates for *similar lands* are "more than what defendant pays, then he is "not entitled to bar plaintiff's suit to enhance "by the statement of witnesses on a plea he "never made himself, and the witnesses do "not state how or in what way defendant "increased the productive powers of the land; "therefore the plaintiff's right to enhance is "not barred by Sections 3 and 4, *or in any* "*way*, and he is entitled to rent at the rate "paid by the *neighbours* as a fair and equit-"able rate; but, as the Deputy Collector gave "a rate less than that, the plaintiff has not "appealed, or cross-appealed, therefore the "appeal is dismissed with costs."

The defendant appeals against this decision, and cites the case reported in Vol. II., Weekly Reporter, p. 39, as showing that he is entitled to the presumption of Section 4 of Act X. of 1859. Another decision in p. 65 of the same Volume is cited on behalf of the respondent.

We think that the defendant's statements fully authorized the Court of first instance in framing the first issue.

The 4th Section of Act X. of 1859 does not require that the defendant should specifically claim to hold from the time of the Permanent Settlement in order to obtain the benefit of the presumption enacted by that Section.

The Court might well also have framed another issue regarding the agency by which the rise on the productive powers had taken place. The Court, however, virtually tried this second issue on the evidence in the case, and the Lower Appellate Court does not appear to us right in holding that the defendant is not entitled to the benefit of what either his or the plaintiff's witnesses have stated on the latter point of the cause of the rise of the productive powers of the land on the question of the rate of rents. The special appellant rightly states that the Lower Appellate Court appears inclined to hold that the defendant should have been made liable to pay at garden rates: but it is to be observed that this is the opinion of the Judge on the assumption that the original state of the lands at the time of the purchase by the ancestor of the defendant is not known: and that the improvement has not been made at the expense and by the agency of the defendant is a fact not before the Court. What would have been the opinion of the Lower Court on this point if it had found the latter fact for the defendant, and had been satisfied that the lands were originally grass lands, cannot be gathered from the decision. The plaintiff does not state from what condition the lands have been converted into garden lands. He simply says that the conversion has been made without expense on the part of the ryot. He does not plead that the rent of the land, as it originally stood, was, or is, below the neighbouring rates. The investigation of the Judge upon these points appears to be imperfect. He should have made the plaintiff state his case more fully.

We accordingly remand the case to the Lower Appellate Court to re-try the appeal with reference to the above remarks.

b

The 6th July 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Continuity of tenure not affected by Zemindars consent to sub-divide, add to, or subtract from, ryot's total holding.

Cases Nos. 3121, &c., of 1864 under Act X. of 1859.

Special Appeals from a decision passed by the Additional Judge of Nuddea, dated the 30th June 1864, reversing a decision passed by the Deputy Collector of that District, dated the 9th March 1864.

Mr. James Hills (Plaintiff), *Appellant,*

versus

Huro Lal Sein and others (Defendants), *Respondents.*

Mr. A. F. Lingham for Appellant.

Baboo Anund Chunder Ghossal for Respondents.

A zemindar, by consenting to a sub-division of, addition to, or subtraction from, the total holding of a ryot, does not destroy the continuity of the tenure in respect of the rate of rent and the rent paid for each beegah of land.

In all these cases, it has been found that the lands have been held at a fixed rate since the Permanent Settlement, with the exception of some excess lands on which an additional rent has been decreed.

Plaintiff urges in special appeal that, although the rates paid by the ryots have been the same, the holdings have been varied in one or other of the following ways, *viz.:*—

1.—The tenure has been sub-divided; or

2.—The ryot has added additional land to his tenure; or

3.—He has abandoned some of the land, and obtained a corresponding diminution of rent.

In all these cases, it is admitted that the zemindars recognised and consented to the arrangement; but it is argued that a new rent was thus created.

We think that the Judge has rightly held that the only question is, whether the rate of rent paid for each beegah has remained unchanged for the periods prescribed by law? If it has, that rate cannot now be altered. The zemindar, by consenting to a sub-division of, addition to, or subtraction from, the total holding of the ryot, did not destroy the continuity of the tenure in respect of the rate of rent, and the rent paid for each beegah of land. It is undoubtedly true that the zemindar might refuse to consent to a sub-division of the tenure or to a contraction of the holding, and might say, "I will hold the whole tenure responsible for the whole rent," but this is not the question in this case. We dismiss these appeals with costs.

The 6th July 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Jurisdiction—Re-hearing of Case decreed ex parte—Determination of Deputy Collector final—Presumption of uniform payment from Permanent Settlement—Proof of 20 years' payment.

Case No. 595 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 19th December 1864, affirming a decision passed by the Deputy Collector of that District, dated the 8th July 1864.

Kunuck Monee Debia (Plaintiff), *Appellant,*

versus

Gunga Ram Doss and others (Defendants), *Respondents.*

Baboos Mohendro Lal Seal and *Dwarkanath Mitter* for Appellant.

Baboo Mohendro Lal Shome for Respondents.

Under Section 13, Act VI. of 1862, B. C., the determination of a Deputy Collector, admitting the re-hearing of a case decided *ex parte,* is final, and not appealable to the Judge.

The holding for 20 years at a fixed rent, from which uniform payment from the Permanent Settlement is allowed to be presumed, must be proved by the best evidence in the tenant's power.

This is a suit for enhancement of rent. The tenant alleges a holding from the Permanent Settlement at fixed rates.

The suit was at first decreed *ex parte,* but was subsequently re-admitted on the file by the Deputy Collector, and tried on the merits. It was then found that the tenant had paid the same rate of rent for more than twenty years; and that the evidence which the plaintiff had adduced to prove that the rent had changed was not worthy of credit. The plaintiff's suit was accordingly dismissed.

On appeal to the Judge that decision was confirmed. The Judge found that, in a former suit between the same parties, it was decided in the year 1841 that the rent which the tenant had always paid was Sicca

Rupees 104-8, and that rent corresponded with the rent which, it was admitted by both parties, was paid by the tenant at the time the suit was brought, *viz.*, Co.'s Rs. 111-7-9; and the Judge, referring to the principle of law, "that, when once a thing has been "established to exist, it must be presumed "to continue until the contrary be proved" (*see* p. 879, S. D. A. Rep., 1859), found that the rent had been paid at one uniform rate from the time of the Permanent Settlement, and that it was for the plaintiff to prove the contrary. The Judge then goes on to say that "the plaintiff shows nothing "to the contrary, and his silence, as regards "the Deputy Collector's decision as to the "falsehood of his evidence to prove that the "rent had changed, must be construed into "an admission that that evidence is false; "but the Court is of opinion that, putting "aside such admission, the said documentary "evidence is not satisfactorily attested, and "consequently does not rebut the above pre-"sumption."

It is contended on special appeal, *first*, that the Judge had recorded no decision on the ground of appeal taken before him, namely, that the reasons upon which the Deputy Collector had admitted a re-hearing of the case after it had been decided *ex parte* were insufficient. We find that the Judge passed no decision upon this point, and we are not satisfied that this point was raised before him, though it is taken in the grounds of appeal. But, whether taken or not, the determination of the Deputy Collector on the point was final (by Section 13, Bengal Legislative Council Act VI. of 1862), and could not be appealed to the Judge. Looking to the facts of the case, we see no reason for a revision of the decision of the Deputy Collector who made a long and careful enquiry before he re-admitted the re-hearing.

It is then urged, *secondly*, that the Judge should find, not on presumption, but on evidence, that the tenants' rent had not changed for twenty years, and that it did not follow that, because the rent was the same in 1841 as it was in 1862, the rent had not intermediately changed. Further, that the defendant had offered evidence to prove that the rent had not intermediately changed, *viz.*, dakhillahs, but the plaintiff alleged them to be fabricated, which the Judge had not considered.

We think that the Judge should not have proceeded on presumption when there was direct evidence offered to the point at issue. The Judge must be satisfied upon the evidence adduced that the rent has not changed. We cannot point out what evidence will be sufficient to prove that the rent has not changed for twenty years; but we consider that it does not follow from the facts that the rent in 1862 is the same as it was in 1841, or that the rent had not intermediately changed. The tenant has it in his power to prove his yearly payment of rent; and we think he should be required to prove those payments to some extent before the presumption is raised in his favour that his rent has not changed from the Permanent Settlement. The Legislature has been most indulgent to the tenant in allowing a holding for twenty years at a fixed rate to be presumptive evidence that the holding has existed at a fixed rate from the Permanent Settlement; and the Courts should, therefore, be the more strict in requiring proof from the best evidence in the tenant's power to adduce that the holding for twenty years has been at a fixed rate. The evidence put in by the tenant should all be considered by the Judge. The fact, that the rent in 1841 was the same as it is in 1862, is most important—the more so as the suit in 1841 was evidently an attempt then to enhance the rents. But the tenant's receipts should also be inspected, and a decision recorded upon them. If the Judge is satisfied that they are forgeries, that fact may rebut the presumption deducible from the fact that the rent in 1862 is the same as in 1841. If the Judge has no reason to believe them to be forgeries, the tenant will have adduced direct evidence to prove that his rent has not been changed, and no presumption will be necessary.

It is then said that the dakhilahs are not attested, but the tenant has himself deposed that these dakhilahs were received by him from the plaintiff on payment of rent. This may be a sufficient attestation, especially when the plaintiff's agent or witnesses do not depose that the dakhilahs were not given as alleged, and no specific ground is stated for alleging them to be forgeries.

The Judge must consider these documents, and pass a distinct decision upon them; and the case is remanded to him for that purpose.

It would appear from the Deputy Collector's proceedings that the plaintiff in this cause by some fraud obtained an *ex parte* decree against the tenant. We think the Deputy Collector should consider whether grounds for instituting criminal proceedings against the plaintiff exist, as it is a most important duty to prevent such an abuse

of justice by punishing the parties implicated in it. The Judge will send a copy of this decision to the Deputy Collector in order that he may consider this point.

The costs of this appeal will follow the final judgment.

The 7th July 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Trial of case—Framing of issue.

Case No. 875 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Purneah, dated the 15th December 1864, affirming a decision passed by the Deputy Collector of that District, dated the 22nd August 1864.

Bebee Reazonnissa (Plaintiff), *Appellant,*

versus

Biram Singh and others (Defendants), *Respondents.*

Mr. J. Baptist for Appellant.

Mr. R. E. Twidale for Respondents.

In trying a case the specific question upon which the parties are in dispute should be placed in issue, and the parties called upon to produce evidence to that question.

THIS case must be remanded for re-trial. No issues have been laid down, and no time has been given to the parties to produce evidence upon the points which are really at issue.

The suit was for arrears of rent at enhanced rates. It was instituted on the 13th July. The day fixed for hearing was the 21st July, which was afterwards adjourned to the 28th July. On that day the plaintiff's and defendant's agents were examined. The plaintiff stated that the defendant had always held 191 beegahs of land at a rent of 51 rupees, but that he now held 216 beegahs, and was, therefore, at the prevailing rate of 2 rupees per beegah, liable to pay a rent of 428 rupees. The defendant replied that he only held 171 beegahs at a fixed rate of 51 rupees from time immemorial. The only issue fixed was whether the plaintiff's claim was just or not. This was, in fact, no issue at all. The specific question upon which the parties are at dispute should be placed in issue, and the parties called upon to produce evidence to that question. At this trial, on the above issue being fixed, two witnesses were examined for the plaintiff. They were very carelessly examined. They deposed that the defendant held the excess land as ascertained by measurement, and that the prevailing rate was 2 rupees per beegah; but no question was put to ascertain from what source they obtained their knowledge of these facts. Probably a proper examination was not made, because the Deputy Collector considered that the defendant's documentary evidence proved that the defendant was not liable to enhancement. The Deputy Collector took no notice of the question of excess lands; but held that the defendant's rent was fixed by a Civil Court decision passed 22 years ago, and that this rent had not changed for more than 20 years; and it might, therefore, be presumed that it had remained fixed from the Permanent Settlement. The Judge on appeal was of opinion that the defendant was liable to enhancement. He made no allusion to the Civil Court decree, and no allusion to the defendant's claim to hold 171 beegahs at fixed rates; but was of opinion that no proof had been adduced to the extent of the defendant's land and to the rate in the neighbourhood being 2 rupees per beegah.

We think that the case must be remanded to the Judge that he may record the proper issues in the case, and see that the parties have proper time given them to adduce their evidence, and that their witnesses are properly examined, either before him or before the Deputy Collector. A decree in a suit under Act X. of 1859 may, under Section 63, be made on the first day fixed for hearing the case only, if both parties have adduced their evidence, and the decree can be properly passed. It may be that the Deputy Collector acted under this Section on hearing the defendant's documentary evidence. But, if the Judge was of opinion that this was not sufficient to bar the claim, he should have fixed the proper issues, and required evidence to be taken upon them under the procedure laid down in Section 65 of the Act. It is not clear from the Judge's decision whether he was of opinion that the whole or any portion of the plaintiff's claim for enhancement was barred on the defendant's documentary evidence. But it would appear that, as respects a portion of the claim, he would have awarded enhancement had the plaintiff adduced evidence; but the witnesses were not properly examined. In such a case, the Judge should have had them re-summoned and properly examined.

This judgment is reversed, and the case is remanded to him for re-trial.

The plaintiff claims enhancement before us also on the ground of increase in the value of the produce; but he has not in his plaint claimed enhancement on that ground, and it is not shown that even in his notice he claimed enhancement on that ground. We therefore disallow the appeal on this point.

The costs will follow the final judgment in the case.

The 7th July 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Collector's Court to try all material issues—Jurisdiction.

Case No. 641 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by Mr. R. Abercrombie, Judge of Dacca, dated the 9th January 1865, affirming a decision passed by the Deputy Collector of that District, dated the 26th July 1864.

Mr. A. B. Mackintosh (Plaintiff), *Appellant,*

versus

Athur Monee Dossee and others (Defendants), *Respondents.*

Baboo Dwarkanath Mitter for Appellant.

Mr. R. T. Allan and *Baboos Chunder Madhub Ghose* and *Romesh Chunder Mitter* for Respondents.

A Collector's Court is not a Court of summary jurisdiction, and cannot refuse to try any material issue duly raised before it.

THIS was a suit for enhanced rent at 1,576 rupees per annum, by notice under Section 13 of Act X. of 1859.

Defendant pleaded a *likhan* or engagement, by which the rent to be paid was limited to 507 rupees.

Both the Lower Courts have held that, until this *likhan* or engagement be set aside by a competent Court, no suit will lie under Act X. of 1859. Both Courts merely notice that the genuineness and validity of the *likhan* are denied by plaintiff; but both Courts also decline to investigate that fact.

Plaintiff appeals specially, urging, *first*, that, until the written engagement set up by defendant be proved by him, the Lower Courts are wrong to hold that the suit cannot lie under Act X.; and that they should have first investigated this question, and then proceeded to decide the case, and take or relinquish jurisdiction according to the result.

2ndly.—That the *likhan* was admitted only by a party who, at the time, had no rights and interests left in the tenure to which the *likhan* referred.

3rdly.—That, even if the engagement were given, its terms did not convey any rights beyond the life of the grantee.

We think that the special appeal must be decreed, inasmuch as the Deputy Collector was wrong in not trying the issue raised, *viz.*, whether the *likhan* was a genuine and valid document, and whether it does by its terms bar enhancement or not. The fact that it has been admitted to be a valid deed in a Civil Court is in its favor, but is not conclusive. The Collector's Court is not, as the Deputy Collector states, and the Judge apparently thinks, a Court to try cases only summarily. Nor can a Collector refuse to try any material issue which is properly raised before his Court. Both Courts decline to enter into the question of the *likhan* and would refer the parties to a competent Court; whereas, for the purposes of this suit, their Courts are the only Courts competent to entertain the question. We accordingly remand the case to be re-tried with reference to the above remarks.

The 10th July 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Appeal (to the Judge)—Suit for Kubooleut—Suit for or against Minors.

Case No. 985 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24 Pergunnahs, reversing a decision passed by the Deputy Collector of that District, dated the 28th November 1864.

Bama Soonduree Debia (Plaintiff), *Appellant,*

versus

Grish Chunder Banerjee (Defendant), *Respondent.*

Baboos Kishen Kishore Ghose, Gopeen Mookerjee, and *Gopal Lal Mitter* for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

Sections 153 and 160, Act X. of 1859, do not apply as to affect the right of appeal to the Judge in a suit for a kubooleut under Clause 1, Section 23.

Suits for or against minors can only proceed when they are duly represented by a guardian or next friend.

THE first plea taken in this special appeal is that under Section 77, Act X. of 1859, the Judge in the Lower or Appellate Court had no jurisdiction to try the case. On this we observe that the suit is for a kubooleut, *i. e.*, under Clause 1, Section 23, Act X. of 1859. Sections 153 and 160, which are cited by the appellant's pleader in support of his present objection, distinctly enact that in suits under Clauses 2, 4, and 7 of Section 23 (not under Clause 1, as this suit is), the Judge shall have no jurisdiction in appeal, unless the suit be for a sum above 100 rupees; but, as this is a suit clearly under Clause 1, the above Sections cannot apply, so as to affect the right of appeal in this case.

The next point for adjudication is whether, as the guardian withdrew from the suit before the decree of the Lower Appellate Court, and there was (as is admitted before us) none but the minor as defendant before the Court when the Judge gave his decree, that decree cannot stand.

A minor is himself no party to a suit in the eye of the law, and can only sue or be sued by a guardian or next friend, and consequently could only have a decree given for or against him, if thus duly represented.

The respondent also distinctly declares that, in the suit before the first Court, there was no guardian capable of carrying on the suit or next friend. We think then, that, on this admission neither the first Court nor the Lower Appellate Court could adjudicate or pass any legal decree in this case.

We accordingly reverse the Judge's decision, and the proceedings in the first Court, as the suit can only proceed when a proper guardian appears. We accordingly dismiss plaintiff's suit with all costs.

The 11th July 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Cause of action—Suit for damages for Unlawful Distraint.

Case No. 904 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 9th August 1864, reversing a decision passed by the Deputy Collector of that District, dated the 29th June 1864.

Tarinee Churn Bose (Plaintiff), *Appellant,*

versus

Shumboonath Panday (Defendant), *Respondent.*

Baboos Bama Churn Banerjee and *Hem Chunder Banerjee* for Appellant.

None for Respondent.

The last act of taking or detention must be regarded as the date of the cause of action in a suit under Section 144, Act X. of 1859, for damages for unlawful distraint.

IN this case the Judge has held that the cause of action in a suit under Section 144, Act X. of 1859, is from date of attachment on distraint.

In special appeal it is pleaded that the last act of taking or detention should be regarded as the date of the cause of action, and this view, it is said, is supported by the case decided by Messrs. Norman and Kemp, JJ., reported at page 597, Hay's Reports for 1863.

We concur in that decision which, we think, quite supports the plea taken in special appeal here, and we accordingly decree this special appeal with costs.

The 11th July 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Suit for enhancement—Failure to prove service of notice.

Cases Nos. 763 and 764 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Mymensing, dated the 16th December 1864, affirming a decision passed by the Deputy Collector of that District, dated the 26th August 1864.

Anund Moyee Chowdhrain (Plaintiff), *Appellant,*

versus

Chunder Monee Dossia and others (Defendants), *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

On failure to prove service of notice in a suit for enhancement, the Court should dismiss the case instead of proceeding to try it on the merits.

IN these two cases the plaintiff sued to enhance the rent of lands held by the defendants, and both the Lower Courts

found that the notice under Section 17 was not proved to have been legally served upon the defendants.

The Courts below should have dismissed the case upon this ground of want of proof of the service of notice, and should not have proceeded to try the merits of the case, simply because the evidence was already on the accord. We accordingly amend the orders of the Lower Courts as far as they have tried the merits of the case, upholding them so far as they found that no notice was served, and dismiss these appeals and the two suits of the plaintiff, special appellant. The costs of the defendant in the first Court should be paid by the plaintiff, and of the costs of the other two Courts each party should bear his own.

The 12th July 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Suit for enhancement—Failure to prove service of notice—Declaratory decree.

Case No. 547 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 5th January 1865, affirming a decision passed by the Deputy Collector of that District, dated the 31st August 1864.

Kristo Motee Debia (Defendant), *Appellant,*

versus

Fukeer Chunder Khan (Plaintiff), *Respondent.*

Baboos Bama Churn Banerjee and *Brojendro Kishore Seal* for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

A landlord, if he fail to prove service of notice in a suit for enhancement, is not entitled to declaratory decree with reference to future years; his suit must be dismissed.

THIS was a suit for enhancement of rent. The Deputy Collectors held that the notice under Section 13, Act X., had not been served in the form prescribed by law. The suit was dismissed.

In appeal, the Judge, without deciding the only issue before him, *viz.*, the legality or otherwise of the notice, remands the case, observing that, granting the notice was not legally served, such plea would not bar the plaintiff's claim for an increased rate of rent in future, though it might be fatal to a claim for enhanced rent for the current year.

It is contended by the special respondent that no appeal lies against an order of remand before final decree; but in this case we find the Judge enunciating a wrong principle of law. The plaintiff, if he fail to prove service of notice in an enhancement suit under Act X., is not entitled to a declaratory decree with reference to future years; his suit must be dismissed. The Judge being wrong in remanding the suit without trying the only issue which can arise, *viz.*, the service or non-service of the notice, we, to prevent unnecessary litigation, remit the case to the Judge to try the issue of service or non-service of the notice. The Judge, if he finds that the notice was legally served, will remand the suit to the Court of first instance to decide it on the merits. If, on the other hand, the Judge finds that the notice was not served, the suit of the plaintiff should be dismissed. The terms of Section 13 are, that no tenant shall pay an enhanced rent unless a written notice has been served upon him.

The 12th July 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Res judicata—Former inconclusive judgment.

Case No. 652 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by Mr. R. Alexander, Officiating Judge of Cuttack, dated the 28th September 1864, modifying a decision passed by Mr. J. S. Armstrong, Assistant Collector of that District, dated the 7th July 1864.

Ramnath Roy Chowdhry (Plaintiff), *Appellant,*

versus

Bhagbut Mohaputter and others (Defendants), *Respondents.*

Baboos Ramanath Bose and *Gopal Lall Mitter* for Appellant.

Baboo Onoocool Chunder Mookerjee for Respondents.

A former judgment proceeding wholly on a technical defect or irregularity, and not upon the merits, is not a bar to a subsequent suit for the same cause of action.

Morgan, J.—A part of the rent for the Bengal year 1268, claimed in this suit, had been previously sued for; and, the previous suit having been decided in the plaintiff's favor by the Court of first instance, the decision was reversed on appeal to the Judge. The Judge's decision, although it determined that suit, did not turn upon the merits, but proceeded entirely on a trivial irregularity, which, if it had not been already waived in that late stage of the suit, might readily have been cured. That suit was instituted by the plaintiff by his agent or gomastah against several persons for rent. Some of the defendants admitted their liability; others disputed it, and appealed. The Judge's decree of reversal was based solely upon some supposed defect in the proof that Kashenath, the gomastah, was a duly authorized agent (a defect which had not apparently been made the subject of objection by the defendants in either Court).

In the present suit, the Assistant Collector has decided, and, I think, rightly, that the former judgment is not a bar to this suit for the rent in question. The cause of action is the same, and the former judgment was pronounced by a Court of competent jurisdiction; but the judgment is inconclusive, and no bar to the present suit, because it proceeded wholly on a technical defect or irregularity, and not upon the merits of the case.

The Judge having reversed the Assistant Collector's judgment, the suit must be remanded to the Judge for trial, but only as to the rent for a part of the year 1268, to which this objection applies.

Shumbhoonath Pundit, J.—For the rent of the year 1268, a suit, brought before by a servant of the special appellant on his behalf, was decreed against the special respondent by the Court of first instance; but the decree was set aside by the Appellate Court, on the ground that it was not shown that the plaintiff in that suit was a servant of the special appellant, the zemindar, as required by Act X. of 1859, Section 35.

Against this decision no special appeal was filed. In the present case, along with the rents of other subsequent years, the rent of the year 1268 being asked, the special respondent pleaded, in bar to that portion of the claim, Section 2 of Act VIII. of 1859. The Court of first instance disallowed the objection, on the ground that the former claim for this rent was not decided in the merits so as to bar a second suit for it. The Lower Appellate Court differed from this opinion, and dismissed the case, stating that, the Appellate Court in the former case having decreed the appeal, its determination amounted to a decision that this rent "was not due" as against a decree awarding it; the defendant has appealed, pleading that it was not due.

The plaintiff has appealed against this order.

I do not agree with the Lower Appellate Court. I see the plaint in appeal was refused as irregular, and not tried. I may hold that, perhaps, it was not proper for the Appellate Court to refuse to try the case in that stage; that the proper order might have been to get the omission supplied; and that the order, if appealed against, might have been reversed; but I do not consider that for all this the present suit is in any way barred. It is clear that in the former case there was no determination of the claim on the merits. It was not dismissed because the plaintiff failed to prove that the rent was due. Section 2 of Act VIII. of 1859 does not speak of cases that might have been "heard," but of cases that have been "heard and determined." In that case evidence of the rent demanded being due was filed by the plaintiff, and proof of its payment was offered by the defendant. All this evidence was not examined or looked into by the Appellate Court, as it had been by the Court of first instance. The plaint was dismissed for an irregularity, and I think that, notwithstanding this order of dismissal, the plaintiff is still authorized to bring another action for the same cause of action if he is in time according to law. Act XIV. of 1859 contemplates the institution of a second suit after such an order. By Section 14 it provides for cases which "any Court before whom it "may have been instituted, from defect of "jurisdiction or other cause, shall have been "unable to decide upon it, or shall have "passed a *decision* which on *appeal* shall "have been annulled for any such cause."

This Act does not apply to cases under Act X., but I refer to this Section of the former Act merely to show that, if the principle is correct for cases under Act VIII. of 1859, it might also be so for cases under Act X. of 1859. The special appellant has not lost any rights by not appealing against the order of a Court of Justice, and by adopting its decision as correct for the case then instituted. He cannot, of course, be allowed to contend its correctness by a new suit, though he might have appealed to show

that it was wrong. He might have also found to his cost that he was wrong in abiding by, and not appealing against, the decision, if it had directed him to proceed in a certain manner opposed to the law, or had granted him a remedy which could not be legally enforced. He was simply told that his case for some irregularity in its institution cannot be tried; and he has now brought a new action free from that irregularity.

The irregularity committed by the plaintiff in the former case is sufficiently punished by the dismissal of that case with costs. A claim dismissed on limitation cannot be brought again; but I do not see why a claim dismissed for an irregularity in the plaint cannot be re-tried.

After an order of dismissal like that passed by the Appellate Court in the former case, there was no necessity to obtain any permission to institute a new case from the Court passing this order. This permission is only necessary when a plaintiff himself likes to *withdraw* a case irregularly instituted as required by Section 97 of Act VIII. of 1859.

I hold in this case that the decision of the Court of first instance was right, and that the law of the Lower Appellate Court is wrong, and would accordingly remand the case to the Lower Appellate Court for re-trial of the appeal preferred before it as far as it related to the rents of the year 1268.

The 13th July 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Stamp Duty—Pottahs.

Case No. 883 of 1865 underAct X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 30th December 1864, modifying a decision passed by the Deputy Collector of that District, dated the 30th August 1864.

Mooheeooddeen Ahmed (Defendant), *Appellant,*

versus

Prannath Roy Chowdhry (Plaintiff), *Respondent.*

Mr. R. E. Twidale and *Baboo Khetter Mohun Mookerjee* for Appellant.

Baboo Motee Lall Mookerjee for Respondent.

Mourosee ryotee pottahs are not required, either by the old or new Stamp Law, to be written on stamped paper.

THIS was a suit for rent at an enhanced rate after issue of notice. The plaintiff produces no kubooleut; but, in his deposition admits the tenancy of the defendant.

The defendant (special appellant before us) pleads a mourosee ryotee pottah. Both Courts refuse to look at the pottah, because it is not stamped; and the Judge refuses to allow the defendant to pay the prescribed fine and obtain a stamp on the document, on the ground that the defendant was a pleader, and must have known that the instrument required a stamp; and consequently that the defendant has wilfully evaded the law.

We think that the Judge is clearly wrong. The plaintiff admits the defendant's tenancy under a lease. The defendant puts a ryotee pottah, which purports to be a mourosee pottah, and which, if genuine, protects the tenure from enhancement. Such a pottah, under the old Stamp Law (Regulation X. of 1829, which governs this case), and, indeed, under the new Stamp Law (Act X. of 1862), does not require a stamp (*see* Article 31, Regulation X. of 1829).

The case is remanded to the first Court, who will admit the pottah, and, after hearing evidence, will decide whether it protects the defendant's tenure from enhancement or not.

The 13th July 1865.

Present:

The Hon'ble G. Campbell and E. Jackson, *Judges.*

Suit for Kubooleut at fixed rent—Decree for more than one year—Proof of increased value.

Case No. 2064 of 1864 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 10th May 1864, affirming a decision passed by the Deputy Collector of that District, dated the 17th March 1864.

Thakooranee Dossee (Defendant), *Appellant,*

versus

Bisheshur Mookerjee and others (Plaintiffs), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Hem Chunder Banerjee for Respondents.

In a suit for a kubooleut at a fixed rent, if the ryot does not object, the Court may fix the rent for more than one year.

When a landlord claims enhancement on the ground of increase in the value of the produce on an ordinary occupancy-tenure without special circumstances, if he can prove by satisfactory evidence a permanent increase (*i. e.*, a steady and normal increase, and not one that fluctuates in a violent and uncertain way, and is affected by extraordinary causes not likely to last), the rent will be increased in the same proportion in which the value or price of the produce has increased.

We have now received the opinion of the Full Court* on the points referred by us; and we have again taken up the case in the presence of the vakeels of the parties. Some other points were discussed before the Full Court which might have affected the case; but the Court were unanimously of opinion that Section 6 of Act X. of 1859 declares the right of all the ryots holding at the time of the passing of the Act, and not prospectively only. And a majority of the Judges are decidedly of opinion that a suit for a kubooleut, at an enhanced rate, will lie without separate notice of enhancement: provided that in that case the enhancement will not take effect till the year following that in which the suit is decided. This last rule will be followed in the present suit. No other point or plea affects the root of the claim now before us. The only further question arising in the case on which doubt seems to have been entertained by some Judges, was whether the landlord can force the ryot to bind himself to a certain rate of rent for more than a single year. We also have doubts on that point; but in this case defendant has made no objection to the prayer of the plaintiff, that the rent should be fixed for three years; and, therefore, it is perhaps unnecessary to instruct the Lower Court farther than as respects the mode of fixing the rate, leaving it to the Court to settle the term with reference to the wishes and circumstances of the parties. It is certain that, if the ryot desires it, the Collector can fix a term not exceeding ten years within which the *rate* cannot be altered, that is all. He cannot, under any circumstances, bind the ryot down to occupy against his will. And, if the rate of rent be fixed for a single year, it is practically fixed for an indefinite period, since the existing rate is to be paid year by year till lawfully altered. It is clear that, in this case, no special contract has been alleged as the origin of the tenure, nor any special circumstances or burdens on account of which the tenure has been held at an exceptionally low rate. The tenure is in every way an ordinary occupancy tenure in respect of which the ordinary presumption, as laid down by the Full Bench, arises. The defendant appears to hold at the ordinary rates paid by other ryots of his class; and the only ground of enhancement which plaintiff has essayed to prove is that the value of the produce has increased from causes independent of both zemindar and ryot. We may, at this stage of the case, discard defendant's allegation that the productive power of the land has rather diminished than increased.

The vakeels of the parties are unable to suggest any objection to all that has been said above. The case to be tried, then, is simply the claim of plaintiff to increase of rent on account of increase in the value of the produce on an ordinary occupancy-tenure without special circumstances; and for the disposal of that question only we direct the Court below. We think that the facts have not been properly found by the first Court; and that the case must go back to that Court of original jurisdiction to find the facts, and apply them according to the ruling of the Full Bench of this Court, *viz.*, that, when "an adjustment of rent is "requisite in consequence of a rise in the "value of produce caused simply by a "rise of price, and by causes independent "both of the zemindar and ryot, the method "of proportion should be adopted in such "adjustments—in other words, the old rent "should bear to the existing (that is, the "new) rent the same proportion as the "former value of the produce of the soil, "calculated on an average of three or five "years next before the date of the alleged "rise in value, bears to its present value." We have already ruled that the evidence of a pyke, who says simply the value of produce has doubled or trebled, is no evidence. The Court of first instance must go fully into the case, and find, on evidence showing circumstantially the former and present value of the main staples produced, whether they have really increased in value, and, if so, what is the general average degree of enhanced value which the produce has acquired since the date of the alleged rise in prices. It is to be remembered that the old rent is taken to be fair and equitable till the contrary is proved. Therefore, the plaintiff is to prove the increase of value, and if such increase cannot

* See *Ante*, p. 29.

be ascertained, or if it appears to fluctuate in a violent and uncertain way, and to be affected by extraordinary causes not likely to last, an enhancement of rent cannot be decreed, but must be postponed till the increase becomes permanent, that is, steady and normal. Supposing the fact of increase to be established, the rent will be increased in the same proportion in which the value or price of the produce has increased.

The proportion of increase of price of the principal staples once carefully found will, practically, very much serve to determine all the cases arising in the same part of the country till another change of prices takes place; and we hope that this will be very carefully ascertained, the plaintiff being required to produce satisfactory evidence of increase of price, and loose statements, such as that of the pyke, not being accepted. The case is remanded to the Court of first instance with the above directions, and with copies of the various judgments recorded in the case.

The 14th July 1865.

Present;

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

"Tikka Mohto" (Construction of)—Enhancement (Homestead lands not protected from).

Case No. 822 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 7th January 1865, affirming a decision passed by the Deputy Collector of that District, dated the 22nd September 1864.

Nuffer Chunder Shaha (Plaintiff), *Appellant,*

versus

Gossain Jysingh Bharuttee (Defendant), *Respondent.*

Mr. G. C. Paul and *Baboos Sreenath Doss* and *Bhuggobutty Churn Ghose* for Appellant.

Mr. J. S. Rochfort and *Baboos Mohinee Mohun Roy, Hem Chunder Banerjee,* and *Dwarkanath Mitter* for Respondent.

The words "*tikka mohto*" cannot be construed as conferring a permanent or *mourosee* lease at a fixed rate.

A ryot, who takes a pottah or gives a kubooleut for his homestead and, is not entitled to the privileges granted to those who erect dwelling-houses on leased lands, and is not protected from enhancement.

We have heard both sides fully on this case; but we are quite clear that the terms "*tikka mohto*" can never be construed as conferring a permanent or mourosee lease at a fixed rate. On this point the Judge is wrong. The words are not tantamount to "mourosee" or "istimraree."

To bar enhancement, however, the pleader for the respondent contends that the terms of the pottah of 1212, read with the terms of the Sale Law, Regulation XI. of 1822, Section 30, or with Section 26, Act I. of 1845, or with Act XI. of 1859, are amply sufficient to protect him against the claim of the plaintiff. The plaintiff, it is said, can have no better right than an auction-purchaser, and even an auction-purchaser could not enhance if the land had been granted at a fair rate for a dwelling-house. The kubooleut states that the lease is granted for "*basat bash,*" or to live and reside on. The Judge finds there are pucka houses on the lands; and these facts, it is urged, when taken together, show that the defendant is entitled to hold on at the fair rent for which the lease was given. On the other hand, the plaintiff shows that the defendant, by his own statement, has only built pucka houses recently, or in 1264, on the land, and he urges that the plaintiff, as zemindar, is entitled to receive a fair rent for the same. It is on this second point, in our opinion, that the case must now be decided.

We are of opinion that the terms of the lease do not warrant the conclusion that the defendant can hold on for ever at the rates at which the rent was fixed. The lease clearly gave the land as homestead, but not for dwelling-houses in the sense in which the term is used in the laws quoted above. It would be quite unreasonable to hold that every ryot who takes a pottah, or gives a kubooleut for his homestead, is entitled to the privileges granted to those who erect "dwelling-houses" on leased lands. That the defendants may have erected a pucka house on the land is an accident not contemplated in the provisions of the original lease. The plaintiff is entitled to claim a fair and equitable rent for the land at the rates prevalent in the same locality, and we remand the case for the Judge to fix the same, after taking any evidence that may be necessary.

The 21st July 1865.

Present:

The Hon'ble G. Loch and F. A. Glover,

Judges.

Jurisdiction—No appeal to Collector from order of Deputy Collector in execution of decree—Sales in execution not to be set aside.

Case No. 137 of 1865 under Act X. of 1859.

Miscellaneous Appeal from an order passed by the Collector of Fureedpore in Dacca, dated the 23rd December 1864, reversing an order passed by the Deputy Collector of that District, dated the 20th September 1864.

Adurmonee Dossee and others (Objectors), *Appellants,*

versus

Kaminee Soonduree Debia and others (Decree-holders), and Huro Chunder Roy (Judgment-debtor), *Respondents.*

Baboos Dwarkanath Mitter and *Gopal Lal Mitter* for Appellants.

Baboos Obhoy Churn Bose and *Bama Churn Banerjee* for Respondents.

No appeal lies to a Collector from an order passed by a Deputy Collector in execution of a decree.

A Deputy Collector cannot set aside a sale in execution of a decree which he has once completed, when there is no default on the part of the auction-purchaser.

In this case, the Deputy Collector, after holding a sale in execution of a decree, under Act X. of 1859, for certain reasons assigned, set it aside. An appeal was preferred to the Collector, who reversed the order of the Deputy Collector, holding that that officer was not competent to set aside a sale which he had once completed, when there was no default on the part of the auction-purchaser. A special appeal is preferred to this Court under the provisions of Section 35, Act XXIII. of 1861, on the ground that, as there is no appeal from an order passed by a Deputy Collector in execution of a decree, the Collector acted without jurisdiction in receiving an appeal, and reversing the order of the Deputy Collector.

We concur in the view taken by the petitioner, that an appeal did not, in this case, lie to the Collector, though we consider the order he has passed to be the proper one; and, under the authority vested in this Court by the latter words of Section 35 above quoted, permitting this Court to pass such other orders *in the case* as may seem right to the Court, we pass the same order as that passed by the Collector, and reverse the order of the Deputy Collector, setting aside the sale. The appeal is dismissed.

The 21st July 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson,

Judges.

Notice of Enhancement.

Case No. 977 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 23rd January 1865, reversing a decision passed by the Collector of that District, dated the 24th November 1864.

Gudadhur Banerjee (Plaintiff), *Appellant,*

versus

Nund Lal Biswas and others (Defendants), *Respondents.*

Baboos Juggadanund Mookerjee and *Bama Churn Banerjee* for Appellant.

Baboo Brojendro Coomar Seal for Respondents.

A notice of enhancement under Section 13, Act X. of 1859, is not required to state that it is for the ensuing year.

The Judge below had decided that the notice under Section 13 was illegal as not stating that it was for the ensuing year. He decides the case on this simple point. He is wrong. The law does not require the specification in the notice of the words "ensuing year."

The respondent urges now that this was not a notice under Section 13, but a demand for a kubooleut. After having heard the notice read, we are of opinion that this is not so.

We remand the case for re-trial on the other points raised by the appellant below.

The 21st July 1865.

Present:

The Hon'ble G. Loch and F. A. Glover,

Judges.

Assessment of Rent on Tanks.

Case No. 235 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 14th September 1864, modifying a decision passed by the Deputy Collector

of that District, dated the 22nd June 1864.

Kuralee Churn Banerjee (Plaintiff), *Appellant,*

versus

Modhoo Soodun Pattur and others (Defendants), *Respondents.*

Baboos Banee Madhub Banerjee and *Bama Churn Banerjee* for Appellant.

Baboo Dwarkanath Sein for Respondents.

A zemindar is entitled to as much rent for his tanks as is leviable on tanks in the neighbourhood, without reference to the rent which Government may take from ryots whose tanks it has resumed.

THIS was a suit to assess rent on a tank with its banks. The Deputy Collector made enquiry into the rates prevailing for tanks in the neighbourhood, and fixed the rent at one rupee per beegah. The Judge on appeal thought the rate excessive, and reduced it to 4 annas, on the ground that Government, in the case of certain resumed tanks, had leased them to their former holders at 2 annas a beegah.

We think that the Judge's order is clearly wrong. Act X. of 1859 sets forth the grounds on which rent can be enhanced, and the system on which they are to be increased. It specially mentions that a party in possession of land, as an occupant ryot, is bound to pay a similar rate of rent to that paid by ryots for similar land under like circumstances. The Deputy Collector has followed the rule, and, after taking evidence as to the amount of rent leviable on tanks in the neighbourhood, has fixed that rate on the special appellant. The Judge has arbitrarily reduced it to 4 annas, simply because Government, acting as zemindar, chose to take that rent from ryots whose tanks it had resumed. This is manifestly no precedent in the present case, nor does the example of Government bind the special respondent; he is entitled by law to as much rent for his tanks as any other neighbour in possession of a tank pays, and this is what the Deputy Collector gave him.

We reverse the Judge's order with costs on special respondent, and remand the case to him in order that he may determine the proper rate of rent with reference to the above remarks.

The 28th July 1865.

Present:

The Hon'ble C. Steer and J. B. Phear, *Judges.*

Res judicata—Waivor and revival of plea of—Effect of Waivor.

Case No. 808 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by Mr. J. C. Dodgson, Judge of Mymensing, dated the 29th December 1864, reversing a decision passed by Mr. J. Boxwell, Assistant Collector of that District, dated the 14th September 1864.

Mugno Moe Debya and others (Plaintiffs), *Appellants,*

versus

Hur Chunder Raoot and others (Defendants), *Respondents.*

Baboos Womesh Chunder Banerjee and *Romesh Chunder Mitter* for Appellants.

No one for Respondents.

A defendant, after having waived his plea of *res judicata* in the Court below, and consented to a trial of the suit on the merits, may revive the plea in the Court of Appeal on the appeal of the plaintiff.

When, however, the plea is waived, and the Court with the consent of both parties goes on with the suit, its decision will be binding as between the parties.

Phear, J.—THE appellant in this case urges that the defendant, respondent, having, when before the Court of first instance, given up his plea that the cause of action had been previously heard and determined, therefore the Lower Appellate Court had no authority to enter upon the question on the occasion of the plaintiff appealing.

We think this contention cannot be sustained. The fact of the cause of action being a *res judicata* deprives the Court of jurisdiction to hear the suit which is founded upon it, and neither party can insist that the suit shall be proceeded with after the Court has become satisfied of the fact, whatever be the mode in which the question was brought to its notice; although, on the other hand, if the Court, notwithstanding such fact, does, with the consent of the parties, go on with the suit, its decision would be binding as between them.

The appellant further objects that the Lower Appellate Court is wrong in its conclusion that the cause of action before it had been previously heard and determined. In regard to this point, as far as we can gather the facts, they seem to be as follows: A

suit was formerly brought between parties through whom the present plaintiff and defendant respectively claim to recover rent at *past* rates, Rs. 30, on certain old lands, and at rupees 21-1 on new land. The decree in that case is not given in evidence; but the record in Court shows that an appeal from it was dismissed, though the reasons for the dismissal are not disclosed. Now, to identify the *res judicata* in that case, with the substantial cause of action in the present suit, the first decree must have decided that the defendant had no new land; that the rent was Rs. 16-10-1, and that that rent could not be enhanced. We are totally unable to say from the materials laid before us whether these points were or were not ruled in that case; and the Lower Appellate Court, whose decision in effect says that they were so, affords us no guide whatever in its judgment as to the mode in which it was led to that conclusion.

The case is remanded to the Lower Appellate Court for re-consideration; and, if necessary, for re-trial, with reference to the above remarks.

Steer, J.—The first question for decision in this case is, whether a defendant, having waived his plea of *res adjudicata* in the Court below, and having consented to a trial of the suit on its merits, can revive the plea in the Court of Appeal in answer to the plaintiffs' appeal; and whether the Judge can allow such a plea, and hold the suit barred by reason of the *cause* of action being a *res adjudicata?*

I think this can be done.

It is another question whether a Court can allow of a waivor of a plea of *res adjudicata* after it is once made, and the evidence has been supplied in proof of it. But a plea of *res adjudicata* is one which depends on proof; and, if a party by whom the plea is raised chooses to withhold the evidence necessary to establish the plea, the jurisdiction is not taken away from the Court to go into the merits of the case.

But the plea once made may always be allowed to be revived, for it is a plea which affects the jurisdiction; and the Judge is always at liberty to satisfy himself by calling for, and accepting, further proof, whether the subject-matter of the suit is identical with the subject-matter of any former suit and between the same parties; for a Judge cannot knowingly adjudicate a matter which has been adjudicated before between the same parties. In the present case, the Judge would have done this, *if his view were* that the former action was identical with the present cause of action.

In the rest of the judgment, and in the order of remand, I coincide with my colleague, whose order of remand I have signed.

The 31st July 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Trespasser—Prescriptive right of occupancy.

Case No. 1228 of 1865, under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 8th February 1865, affirming a decision passed by the Deputy Collector of that District, dated the 16th September 1864.

Sheikh Gholam Hyder and others (Plaintiffs), *Appellants,*

versus

Rajah Poorno Chander Roy and others (Defendants), *Respondents.*

Baboos Hem Chunder Banerjee and *Romesh Chunder Mitter* for Appellants.

Baboos Issur Chunder Chuckerbutty and *Oopender Chunder Bose* for Respondents.

A person who holds land without payment of rent and is a trespasser, acquires no prescriptive right of occupancy.

THE zemindar defendant brought an action against one Soojaooddeen for the resumption of certain lands belonging to his estate, which the said Soojaooddeen alleged to be lakheraj. The decree declared the lands to be "mâl;" and in executing that decree the zemindar found the lands in the occupancy of Hakum, son of Soojaooddeen, who stated that he had sold his right and title in the property to Gholam Hyder, and had then taken them on lease from his vendee.

Gholam Hyder brought the present suit against the zemindar for a pottah on fair and equitable rates as having a prescriptive right of occupancy; but the Judge held that a right of occupancy was personal; and, though it might descend to an heir, it could not be transferred to a stranger; and, therefore, the plaintiff was entitled to a pottah only under Section 8 of Act X. of 1859, and not under Section 6.

In special appeal, it is pleaded that, as the resumption suit was brought under Section 30, Regulation II. of 1819, the resumed lands must, under the provisions of Section

6, Regulation XIX. of 1793, be considered as a dependant talook; and, as proprietor of such a talook, Hakum had power to transfer the interests which he possessed. We find from the decree passed in the resumption case that the zemindar claimed the lands as part of his estate, and, as such, they were decreed to him. The citing of a wrong law was immaterial, as the nature of the claim was fully disclosed in the plaint and decreed. This plea is rejected.

It is urged, *secondly*, that, as plaintiff's vendor had a right of occupancy, he could transfer it by sale; and that a judgment of this Court, reported at page 86, Vol. I., of the Weekly Reporter, had determined that a right of occupancy was transferable by sale. In this case, however, we have to see whether plaintiff's vendor had a right of occupancy at all. Admitting that he held possession of the land for more than twelve years, yet it is evident that he held it without payment of a rent. Now, as the land in question is proved to have been part of the defendants' estate, we think the plaintiff's vendor could not plead prescription unless he had paid rent, whereas he had been holding the lands as a trespasser, and, as such, had no rights whatever. We see no grounds for interfering with the order passed by the Judge, and dismiss the appeal with costs.

The 31st July 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Presumption of uniform payment from the Permanent Settlement—Dakhilas for 20 consecutive years not necessary—Attestation of—Onus probandi (Plea of Mal land).

Case No. 646 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 19th December 1864, modifying a decision passed by the Deputy Collector of that District, dated the 23rd July 1864.

Gobind Kurmokar (Defendant), *Appellant,*

versus

Koomudnath Bhuttacharjee (Plaintiff), *Respondent.*

Baboos Tarucknath Sein and *Dwarkanath Banerjee* for Appellant.

Baboos Kishen Kishore Ghose and *Dwarkanath Mitter* for Respondent.

Dakhilas need not be for 20 consecutive years to give the benefit of the presumption of uniform payment from the Permanent Settlement.

Dakhilas not denied need not be attested.

The *onus* of proving that mâl land is wrongly held as lakheraj, is on the party so pleading.

In this case plaintiff sued to assess defendant's lands under Act X. of 1859. Defendant's plea was that he paid a uniform rate of rent as to a certain portion of his land, and that the rest was rent-free. Defendant filed copy of a taidad, and 33 dakhilas from 1251 to 1269 B. S. The first Court held that the amount of no two dakhilas agreed, and that they "were not of that uniform character as to enable one to calculate what was the actual rent he (defendant) paid for his holding annually." The first Court on this held that there was "no proof that a uniform and unaltered rate of rent had been paid since the Permanent Settlement." As to defendant's claim to certain lands as lakheraj, the first Court held that defendant's deeds referred to lands in Gopeenathpore; whereas plaintiff's suit was to assess lands as in Noapara. Defendant's deed of sale of 6th Cheyt 1220, which specified these lakheraj lands to be of Gopeenathpore, but situated in Noapara, was rejected by the first Court as suspicious, and as contradicted by plaintiff's Loazima papers from 1231 to 1264, which the first Court believed to be genuine. The first Court, therefore, decided against defendant.

The defendant appealed to the Judge, who held that, as the dakhilas for the mâl plots were not for 20 consecutive years, or, to use his own words, "less than 20 years before suit," those papers were "no proof that the land had been held at one uniform rate for 20 years before suit, even if they were true; but as they are unattested, and defendants do not, in any way, prove payment at one such uniform rate for 20 years," "the plaintiff was entitled to a decree."

As to the lakheraj plots, the Judge states that, "though an issue on this point was raised by the Deputy Collector, the *defendant did not prove* before the Ameen or before the Deputy Collector that the deed of sale evidencing defendant's lakheraj title was true, or that the land was so held by them."

Against this decision defendant appeals specially, and urges (1) *as to his mâl lands*, that the dakhilas need not be for 20 consecutive years in order to give the benefit

of the favorable presumption of Section 4, Act X. of 1859; and, also, that the dakhilas were not denied by the plaintiff; and, further, that the Lower Appellate Court has not given sufficient reasons for discrediting the oral evidence produced to support the allegation of uniform payment for 20 years.

(2.) *As to the lakheraj land*, that the *defendant* has had put *on him* the burden of proving the rent-free title; whereas, by the final Full Bench decisions of this Court, dated 22nd February 1865,* the *onus* of proving that land heretofore and at the Decennial Settlement mâl is improperly held as lakheraj land is on plaintiff, but plaintiff had not had this burden in any way put upon him in this case.

We are of opinion that it is not necessary that dakhilas should be *for* every one of 20 consecutive years in order that a party should have the benefit of the favorable presumption allowed by Section 4. It will be enough if there is such an amount of evidence from them as will justify a legal presumption that uniform rent has been paid for 20 years; and oral evidence may and should be admitted and noticed if tendered to support and confirm the plea of such uniform payment. Here, too, it is specially to be remarked that plaintiff did not deny the dakhilas, so that the requisition on the defendant for attestation was quite unnecessary.

As to the *lakheraj* land, we have only to refer the Judge to the decision cited, from which he will observe that the plea taken is in accordance with the final ruling of the Full Bench of the High Court.

We accordingly decree this appeal, and we remand the case to be re-tried with reference to the above remarks.

The 1st August 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges*.

Production of forged document by a party to a suit (Effect of).

Case No. 1415 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by Mr. H. B. Lawford, Judge of Jessore, dated the 18th March 1865, reversing a decision passed by the Deputy Collector of that District, dated the 20th June 1863.

The Bengal Indigo Company (Defendants), *Appellants*,

versus

Tarineepershad Ghose (Plaintiff), *Respondent*.

Mr. J. S. Rochfort for Appellants.

Mr. A. F. Lingham for Respondent.

The production of a forged document in evidence by a party to a suit does not exempt the Court from a full examination of the whole evidence adduced.

THE defendants in this case, the Bengal Indigo Company, have appealed specially from the decree of the Lower Appellate Court, reversing the Deputy Collector's decision, which was in their favor.

The suit was brought to enhance the rent of lands at Chowgachee, on which an Indigo Factory and buildings belonging to the Company stand. The Courts relied on a mourosee pottah of the lands granted in 1216, to a former proprietor, at a fixed rent of sicca Rupees 92. The Deputy Collector, although holding the pottah to be a fabrication, nevertheless found that the defendants had established a right to be protected from enhancement of rent, and in his judgment substantial reasons are given for this latter conclusion. The receipts for rent produced and proved expressly stated that the jumma was mourosee, and the Deputy Collector thought it improbable that buildings of great value should be erected by a lessee of lands without such a pottah.

The lands having been let many years ago, and the factory, &c., having been the subject of several subsequent transfers, he thought it probable that the original pottah had been lost, and that a fabricated pottah had been substituted. No material alteration in the amount of rent hitherto paid is shown.

The Lower Appellate Court concurred in the finding that the pottah was fabricated, but not in the other conclusion of the Deputy Collector. The Judge says: "When, "however, the defendants' pottah is found "to be not genuine, and when even in that, "such as it is, there is no mention of the "pottah being a mourosee one, nor any "agreement as to subsequent holding of the "factory land for ever at the rent originally "fixed, I do not consider that the mere "mention of the defendant in the receipts as "mourosee pottahdar is at all sufficient "proof that his tenure is of a fixed and "mourosee nature." The pottah, so far as it can be deciphered, after stating the amount of rent payable year after year, may mean that no sum in excess of that shall be

* *See* Vol. II., Civil Rulings, p. 205.

demanded, and it has been argued that the Judge has misapprehended the effect of the pottah. As the document itself has been found by both the Courts to be a fabrication, it is needless to consider the effect of particular expressions contained in it.

The ground on which this judgment is defective is that, while rejecting the pottah, it does not duly dispose of the other material evidence from which the Deputy Collector has drawn his conclusions. If the Lower Appellate Court meant to decide that the production in evidence on behalf of the Company of a document pronounced to be forged was of itself sufficient to destroy the defendants' case, without reference to the other evidence adduced, the Court was in error. The production of a forged document in evidence by a party to the suit should not have the effect of exempting the Court from a full examination of the whole of the evidence given. If the real nature of the document may fairly be taken to be known to the party who produced it, his conduct raises a presumption against his whole case. We have already, in a former judgment, had occasion to consider this question (*see* Vol. II., Weekly Reporter, p. 100). If the defendants, by their agents, have knowingly given in evidence a fabricated document, a grave presumption against the truth of their alleged defence may arise. But the Judge should also take into consideration, not only the receipts, but also the other circumstances to which the Deputy Collector has adverted, which make it probable that the rent reserved by the original pottah was fixed, and not subject to enhancement. The Judge rightly held that the presumption, enacted by Section 6 of Act X. of 1859, could not arise in the present case, the admitted origin of the tenure being subsequent to the Permanent Settlement. We remand the suit for trial by the Lower Appellate Court.

The 1st August 1865.

Present :

The Hon'ble C. Steer and G. Campbell, *Judges.*

Enhancement of rent of Howala—Proof of existence of Howala—Witnesses (Enforcing attendance of).

Case No. 226 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 6th December 1864, affirming a decision passed by the Deputy Collector of that District, dated the 17th June 1864.

Anund Lal Roy Chowdhry (Plaintiff), *Appellant,*

versus

Ramtonoo Doss and others (Defendants), *Respondents.*

Baboo Onoocool Chunder Mookerjee for Appellant.

Baboos Sreenath Doss and *Unnoda Pershad Banerjee* for Respondents.

Until a plaintiff shows that the defendant holds of him a rent-paying howala, he cannot enhance the rent thereof.

No reasonable application to compel the attendance of important witnesses should be rejected without good and sufficient cause.

It is admitted by both parties that defendant holds a *zimma* or talook under plaintiff. Plaintiff alleges that, apart from this talook, defendant holds a howala, for which he pays a separate rent, and he sues for enhancement of the rent of that howala. Defendant denies the existence of any such howala, and says that the land in dispute is part of his talook. The effect of the finding of both the Courts below is that, in respect of the howala, no relation of landlord and tenant has been shown to exist between plaintiff and defendant—in fact, that hitherto no such rent-paying howala exists. This finding would be quite sufficient to dispose of the suit, for, till plaintiff shows that defendant holds of him a rent-paying howala, he cannot possibly enhance the rent of that which is not shown to exist. In that case he must proceed against any excess lands in another way The first grounds of special appeal are rejected.

But, as regards the latter grounds, we find that plaintiff summoned a large number of witnesses, scarcely any of whom attended, and the few whom he brought were not examined. The case was disposed of without taking any measures to enforce the attendance of the recusant witnesses. There was in this a denial of justice, and the Judge is most entirely wrong in the extraordinary doctrine propounded by him, that measures to compel attendance should never be employed unless there is an absolute necessity. We think that, as a rule, no reasonable application to compel the attendance of important witnesses should be rejected without good and sufficient cause.

The case is remanded to the first Court in order that plaintiff may again have an opportunity of adducing proof.

The 2nd August 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Special Plea (Rejection of).

Case No. 246 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 27th September 1864, affirming a decision passed by the Deputy Collector of that District, dated the 28th July 1864.

Gora Chaund Koloo Sadookhan (Defendant), *Appellant,*

versus

Doya Moyee Dossee (Plaintiff), *Respondent.*

Baboo Nubo Kishen Mookerjee for Appellant.

Baboo Kallee Mohun Doss for Respondent.

The rejection of a defendant's special plea does not preclude him from obtaining the Court's assistance on other pleas.

PLAINTIFF sues defendant for an enhancement of rent after service of notice.

The defendant pleads that he holds a mokurruree tenure; that the productive power of the land has been increased by his agency and expense; and that the present rent is higher than that borne by lands of a similar description in the neighbourhood.

The Lower Courts found defendant's mokurruree to be a forgery; but, refusing to enter into the other pleas raised by defendant, decreed plaintiffs' suit.

Defendant now appeals specially, urging that, notwithstanding that the Lower Courts decreed against his mokurruree tenure, they should have proceeded to enquire into his other pleas.

We think that the fact, that defendant's mokurruree or special plea has been rejected, and that the pottah set up has been declared a forgery, does not preclude him from obtaining from the Courts assistance on those pleas which have been pleaded by him in accordance with the express provisions of the Statute Law. We, therefore, remit the case to the Lower Courts in order that they may enquire fully and thoroughly into the other pleas raised by defendant.

The 2nd August 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Presumption of uniform payment from Permanent Settlement (Proof of).

Case No. 241 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 18th November 1864, reversing a decision passed by the Deputy Collector of that District, dated the 28th June 1864.

Radhanath Sircar (Plaintiff), *Appellant,*

versus

Binodee Paul and others (Defendants), *Respondents.*

Baboo Khettermohun Mookerjee for Appellant.

Mr. J. S. Rochfort for Respondents.

A holding at a uniform rate from the Permanent Settlement may be proved by presumption or indirect evidence.

THIS was a suit for enhancement of rent. The Judge finds that the rent has been uniform for twenty-eight years, and that the presumption of holding from the Permanent Settlement arises, and is not rebutted; also, that the land is held within defined boundaries, and that the difference between fourteen cottahs previous measurement, and fifteen cottahs present measurement, is not a ground of enhancement. Plaintiff in special appeal urges that defendant did not specially plead a holding from the Permanent Settlement. He pleaded a holding from his ancestors; and, in truth, the Act does not require a plea of holding from the Permanent Settlement. If it is proved that the land has been held at a uniform rate for more than twenty years, such a holding is, by Section 4, Act X. of 1859, to be presumed, unless the presumption is rebutted either by evidence or admissions of the creation of the

tenure at a later date. It is also urged that the holding for upwards of twenty years has not been proved by full legal and direct proof, and that no presumption or indirect evidence, however strong, can be accepted. This contention is quite erroneous. If by evidence, direct or indirect, the holding at a uniform rate is proved to the satisfaction of the Court, that is enough. In this case, the Judge, finding from evidence produced by the plaintiff himself that the defendant's father, twenty-eight years ago, on renewing an old pottah, engaged to pay the same rent which is now paid, and, taking that with the whole circumstances of the case, was reasonably satisfied that the rate of rent had not been varied since that time.

It is true that the former pottah is not produced; but, if the rent paid has, in fact, been uniform for twenty years, and can be presumed to have been uniform from the Permanent Settlement, it cannot now be varied.

The land is found by the Judge to be that included within the boundaries formerly given, and that is enough.

The appeal is dismissed with costs.

The 4th August 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Possession—Debuttur property (Assignment of profits of).

Cases Nos. 1094 and 1095 of 1865 under Act X. of 1859.

Special Appeals from a decision passed by the Additional Judge of Jessore, dated the 26th January 1865, affirming a decision passed by the Deputy Collector of that District, dated the 6th August 1864.

Maharanee Shibessuree Dabia (Objector), *Appellant,*

versus

Mr. John Beckwith (Plaintiff) and others (Defendants), *Respondents.*

Baboo Sreenath Doss for Appellant.

Mr. A. F. Lingham and *Baboo Motee Lal Mookerjee* for Respondents.

Actual possession is to be looked to.
The profits of a Debuttur Mehal may be assigned so long as the *Deb Seba* is duly kept up.

THE pleaders on both sides admit that these two cases will be governed by one and the same decision.

Plaintiff, as mouroseedar of certain Debuttur Julkur, sued one Pitumber Doss for rent under a dowl.

Defendant, Pitumber Doss, admitted the dowl and jummah claimed.

A third party, Shibessuree Dabia, intervened, and alleged that she held the julkur in dispute under a decree, in execution of which possession had been delivered to her by erection of bamboos; and that she had made a settlement of the julkur, the rents of which plaintiff claimed, with one Bydnath Manjee and others.

Bydnath Manjee and others supported this averment.

The first Court found that the title of plaintiff's lessor had been set aside by a decree in favor of Shibessuree; but that, as the plaintiff's actual possession was proved, he was entitled under Section 77, Act X. of 1859, and a decision of this Court, of the 4th August 1863, to a decree. The first Court gave a decree accordingly.

Shibessuree appealed, and the Lower Appellate Court, going fully into the evidence, has held that, although Shibessuree had a decree for possession, still the *real* and *actual* possession had all along been with plaintiff under a mourosee lease from one Joy Monee, and that Joy Monee's title was clearly established under an ekrar on the part of the intervenor.

There is a special appeal on the part of this intervenor, *viz.*, Shibessuree, in which it is urged:—

1st.—That Joy Monee could not alienate Debuttur property; and

2nd.—That the decree of Shibessuree supersedes, by the title it gave and possession granted in execution by the Courts, any previous right of Joy Monee to give a mourosee pottah to plaintiff.

On the *first* point, we remark that, from the judgment below, this point would not seem to have been pressed on the Lower Courts. But, be that as it may, we are of opinion that the profits of a debuttur mehal may be assigned so long as the *Deb Seba* be duly kept up; and that the *Deb Seba* was not so kept up in this instance is not shown.

On the *second* point, we are of opinion that both Courts have, in fact, found on the evidence that the intervenor Shibessuree had neither title nor possession as to the lands in suit, and that the ekrar transferred the former, while the evidence proved the plaintiff's possession.

In this view, we dismiss these special appeals with costs.

The 14th June 1865.

Present:

The Hon'ble *Sir* Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, J. P. Norman, and Shumbhoonath Pundit, *Judges*.

Suit for enhancement—Local investigation (Courts not bound of their own motion to order).

Cases Nos. 2632 to 2664 of 1864 under Act X. of 1859.

Special Appeals from a decision passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 28th June 1864, affirming a decision passed by Mr. A. Weeks, Assistant Collector of that District, dated the 13th May 1864.

Mr. C. McDonald (Plaintiff), *Appellant*,

versus

Munar Roy and others (Defendants), *Respondents*.

Mr. R. T. Allan and *Baboo Kishen Succa Mookerjee* for Appellant.

Baboo Debendro Narain Bose for Respondents.

In a former suit the ryot failed to set aside a notice of enhancement, it being held that the productive power of the land had increased; but it was left to a future suit to decide what those rates should be. This suit having been brought for that purpose, the plaintiff declined to adduce any further evidence than the judgment in the former suit, which being no evidence at all, both the Lower Courts dismissed the suit. HELD that the Lower Courts were not bound of their own motion to order a local investigation.

THIS case was referred to a Full Bench by Justices Steer and Jackson with the following orders:-

Mr. Justice Steer.—In a former suit it was held that the productive powers of the land in this case had increased otherwise than by the agency of the defendant; but it was left to an after-suit to decide what those rates should be.

This suit is the suit brought for that purpose. Both sides filed evidence; but the evidence of the plaintiff did not establish, in the opinion of the Court, that the fair and equitable rate was the rate claimed by the plaintiff, and, inasmuch as he did not petition to have a local investigation for the purpose of ascertaining what the fair and equitable rates are, the Judge thought he had failed in his suit, and dismissed it.

I hold that, whereas in this case a plaintiff gives some documentary evidence to prove the enhanced rent he is entitled to, and that evidence does not satisfy the Court that he is entitled to the extent claimed; it is essentially a case in which justice cannot be done without a local investigation, and the Judge is quite in error in supposing that a local enquiry cannot be resorted to without a direct application made to the Court for that purpose. The former decision was conclusive that the plaintiff was entitled to some enhancement. He gave evidence such as it was, as to the rate he considered himself entitled to; and, if this evidence did not satisfy the Court, it might, and it ought in the ends of justice, to have ordered a local investigation, and thus obtained from an independent source reliable evidence to clear up all doubt upon the point as to what the rates should be. I hold, therefore, that the investigation in this case has been defective, and that that is a proper ground for a remand. I would remand the suit accordingly.

Mr. Justice Jackson.—I regret that I am unable to concur in the opinion which my colleague has recorded in this case.

The suit was for enhancement of rent pursuant to notice. The ryot had in a former suit claimed exemption from the enhancement demanded in that notice under Section 14, Act X. of 1859. The ryot then claimed to hold at fixed rates, and alleged that the ground upon which enhanced rent was demanded in the notice, *viz.*, that the productive power of the land had increased, was false in fact. The ryot's suit was dismissed, his right to fixed rates disallowed, and the fact that the productive power of the land had increased found to be true. But it was at the same time recorded that the question as to what was a fair and equitable rate of rent, and the extent to which the productive power of the land had increased, was left open to decision in a future suit which it might be expected that the plaintiff would bring. Accordingly, this suit is brought, and the issue raised by the Deputy Collector is, what would be a fair and equitable rent for the land; the plaintiff adduced, as evidence on this point, the judgment of the case in which the ryot had sued for exemption from enhancement, and urged that that judgment was conclusive evidence as to his right to obtain the enhanced rent named in his notice. The plaintiff put in no further evidence, and, as the case had been kept pending some time on his account, the Deputy Collector ruled that the judgment was no evidence at all, and dismissed the suit. The plaintiff appealed,

and the Judge confirmed the decision of the Deputy Collector, and threw out the objection of the plaintiff that the judgment in question entitled him to a decree for the amount of rent demanded in the notice.

It is now again urged in special appeal that that judgment having dismissed the claim of the ryot to set aside the notice, the plaintiff was entitled to a decree without producing further evidence. It is agreed that this objection is worthless; that that judgment only ruled that the ryot was not exempted from enhancement; and that it left still open the question whether the plaintiff was entitled to any enhancement, and, if so, to what extent. It certainly ruled that the productive power of the land had increased; but it was still necessary to go into the remaining point, whether, that ground being proved, the plaintiff was, under the altered circumstances of the case, entitled to enhance the rent. That fact would depend on the extent to which the increase in productive power had force, and on the expenditure which the land required for cultivation.

It is, then, said that, admitting this, the Deputy Collector was bound of his own accord to direct a local investigation, and the Judge should, on appeal, have ordered such an investigation for the respondent. It is contended that this was a matter within the discretion of the Court.

I think the Deputy Collector was not at all bound to direct a local investigation. He was right to call upon the plaintiff to prove that the rates he demanded were fair and equitable. He appears to have kept the case pending for some time to enable the plaintiff to give his evidence on this issue, and to have only dismissed it when the plaintiff declined to give any further evidence than the judgment in the former case, which was, in fact, no evidence at all. The plaintiff might, as the Judge on appeal says, have asked for a local investigation, but he did not. He rested his case on the judgment, and accordingly lost it. Before the Judge the plaintiff again rested his case on the judgment; but the Judge very properly confirmed the decision of the Deputy Collector. It is too late now for the appellant to ask for a local investigation, and I cannot see that there has been any error in law in the procedure in the Courts not ordering a local investigation of their own accord. A plaintiff, when he brings his case, particularly one of enhancement, is bound to be ready to furnish his evidence; and, if he fails to produce it when called upon, his suit must be dismissed. It is very hard upon ryots that they should not know what rent they are to pay for the past two years, and that suits for enhancement should remain pending over them, because the plaintiff is not ready to prove what rents they ought to pay.

I would dismiss this appeal with costs.

Judgment of the Full Bench.—We agree with Mr. Justice Elphinstone Jackson in this case. We think that there was no error in law, and that the Judge was not bound to grant a local investigation. The decree of the Lower Court is accordingly affirmed with costs.

The 7th August 1865.

Present:

The Hon'ble G. Campbell and F. A. Glover *Judges.*

Suit for rent—Claim by intervenor—Appeal to Judge—Appellate Court (bound to decide where sufficient evidence on record).

Csse No. 574 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 8th December 1864, reversing a decision passed by the Deputy Collector of that District, dated the 10th May 1864.

Punchanun Koonwur and others (Plaintiffs), *Appellants,*

versus

Luckhee Preea Debia and others (Defendants), *Respondents.*

Baboo Bungsheedhur Sein for Appellants.

Baboos Greeja Sunkur Mojoomdar and *Bhuggobutty Churn Ghose* for Respondents.

Where a Deputy Collector, in trying a claim under Section 77, Act X. of 1859, in a suit for rent below 100 rupees, goes beyond the scope of the law, and, instead of merely deciding who is in the *bonâ fide* receipt of the rent, goes also into questions of title, and decides the right to receive rent as between the plaintiff and the intervenor, the appeal lies to the Judge, and not to the Collector.

In such a case the Judge, instead of remanding the case to the Deputy Collector for trial of the right issue, is bound, under Section 353, Act VIII. of 1859, to determine the case finally, if the

evidence on the record is sufficient to enable him to pass a satisfactory judgment.

THIS was a suit for arrears of rent amounting to rupees 11-7-2-17. The plaintiff was a small lakherajdar, and stated that the ryot Durbaroo held 8 doons of his land at the rent above stated. Two parties intervened under Section 77 of Act X. of 1859: Luckhee Preea Debia, the zemindar, and Robeeoollah, a jotedar, who had purchased his rights under her.

The Deputy Collector found for the plaintiff. But the Judge on appeal held that the jotedar, Robeeoollah, was the person who had hitherto *bonâ fide* received and enjoyed the rents of the land, and therefore dismissed the plaintiff's case.

It is urged in special appeal that the Judge had no jurisdiction, the value of the suit being under 100 rupees (Section 155, Act X. of 1859).

This objection must, to a certain extent, be allowed. Ordinarily, no doubt, the appeal would lie to the Collector and not to the Judge, and a Full Bench of this Court has so ruled it. But in the present case the Deputy Collector, in trying the claim under Section 77, went beyond the scope of the law, and, instead of merely deciding, as he ought to have done, who had been in *bonâ fide* receipt of the rent, went also into questions of title, and decided the right to receive rent as between the plaintiff and the intervenors. Under such circumstances, the appeal would lie to the Judge (S. D. A. Rep., March 1862, pp. 73-76; and 3 Sutherland's Weekly Reporter, p. 27).

It is further contended by the special appellant that, admitting the appeal to lie to the Judge, that functionary was not competent to go into the merits of the case; he ought to have pointed out the Deputy Collector's error in going out of the record, and have remanded the case to him for trial of the right issue.

This point has, we observe, been decided the other way in the ruling of the Divisional Bench of this Court above quoted (Beebee Jameerun *versus* Nichuk Thakoor). It was then held, and we think correctly, that, an appeal having been properly made to the Judge in a precisely similar case to the one we are now considering, the procedure to guide him in hearing that appeal is that laid down in Act VIII. of 1859; and that, under Section 353 of that Act, the Judge was bound finally to determine the case if the evidence upon the record was sufficient to enable him to pass a satisfactory judgment.

There is no contention in this appeal that the Judge did not come to a right decision on the merits of the case; the only points taken in special appeal are those above considered.

We dismiss the special appeal with costs.

The 8th August 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Limitation—Suit to contest decision under Section 77 of Act X. of 1859.

Cases Nos. 969, 970, and 971 of 1865.

Special Appeals from a decision passed by the Judge of Backergunge, dated the 11th January 1865, reversing a decision passed by the Moonsiff of that District, dated the 28th March 1864.

Neemaye Joogy and others (Plaintiffs), *Appellants,*

versus

Afsurooddeen Mahomed Chowdhry and others (Defendants), *Respondents.*

Baboo Greeja Sunker Mojoomdar for Appellants.

Baboos Hem Chunder Banerjee and *Kalee Mohun Doss* for Respondents.

The time allowed to contest a decision under Section 77, Act X. of 1859, is one year from the date of the Collector's decision, and not from that of the Judge, although the Collector's decision may have been favorable, and the Judge's adverse, to the plaintiff.

IN the first two of these cases, the decision of the Judge is correct in law. The time allowed to contest a suit under Section 77 of Act X. of 1859 is one year from the date of the Collector's decision. It is urged, indeed, that the time should run, not from the date of the Collector's decision, but from that of the Judge; the former being favorable to the special appellant as regards the property claimed in Suit No. 969, and the latter only being adverse. But the words of the law are precise, and the plaintiff should have taken care, after the appeal was adverse to him, to have sued within one year from the date of the Collector's decision, which he might easily have done, as he had still more than two months left to him. The case No.

970 is still more against the plaintiff; for there the decision of the first was not favorable, but adverse to him. This disposes of two appeals. On the last case, No. 971, we observe that the decision all turned on facts and evidence, and that no law point can be made out.

We dismiss the three appeals with costs.

The 9th August 1865.

Present :

The Hon'ble C. Steer and J. B. Phear, *Judges.*

Sale of under-tenure—Non-registration of under-tenant's name in Zemindar's register—Jurisdiction (of Civil Court)—Non-intervention under Section 106, Act X. of 1859.

Case No. 1065 of 1865.

Special Appeal from a decision passed by Mr. T. C. Pennington, Principal Sudder Ameen of Dacca, dated the 9th January 1865, affirming a decision passed by the Moonsiff of that District, dated the 29th April 1864.

Mooktokashee Dassia (Plaintiff), *Appellant,*

versus

Brojunder Coomar Roy and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Romesh Chunder Mitter* for Appellant.

Baboos Kali Mohun Doss and *Hem Chunder Banerjee* for Respondents.

An under-tenant may sue to recover his under-tenure sold by his zemindar for arrears of rent, although his name does not appear in the zemindar's register.

He may also prefer his claim in the Civil Court, although he did not previously intervene in the Collector's Court under Section 106, Act X. of 1859.

THIS is a suit brought to recover a certain under-tenure which has been sold by the zemindars for arrears of rent. Both the Lower Courts dismissed the suit, on the ground that the plaintiff had not made out any title to the tenure.

On special appeal, the plaintiff urges that the Lower Appellate Court, in deciding the question of title, has omitted to give consideration to certain receipts for rent produced by the plaintiff as given to her predecessor by the zemindar. It, in fact, seems that the Lower Appellate Court considered that no one could have a right to bring a suit of this kind, unless his name actually appeared in the zemindar's papers, and has looked at no evidence which did not bear immediately on this point. We think that this is a mistake of law. Quite apart from the question whether one who has, of his own fault, omitted to register can sue, it is possible that the non-appearance of the plaintiff's name in the zemindar's register may not be due to her own laches, but to quite a different set of causes. If, moreover, a zemindar choose to accept rent from a person who is not registered, he cannot afterwards take advantage of the non-registration. Consequently the receipts put forward by the plaintiff, and even the character of the transactions, which terminated in the sale of the tenure for alleged arrears of rent, as being all highly important towards elucidating the exact nature of the position in which the plaintiff stood relative to the tenure in question, ought to have been looked at and enquired into by the Lower Appellate Court.

On the side of the respondent, we have been pressed with argument that the plaintiff has no *locus standi* in the Civil Court at all, because she did not, in pursuance of Section 106 of Act X. of 1859, previously intervene in the Collector's Court. To this we answer, that we find no words in Sections 106, 107, and 151, or, indeed, in any other part of Act X. of 1859, which have the effect of prescribing an exclusive mode of suit in this case ; and it is a maxim of English jurisprudence that no subject of the Queen is to be held barred from preferring his suit in the Civil Courts of the country otherwise than by the express words of the Legislature. Of course, when a party lies by, and omits to assert his right on the first occasion, when he has the opportunity of so doing, this inaction, if unexplained, will, in subsequent proceedings, give rise to adverse presumptions against him. But, in our opinion, no other disadvantage than this attaches to one who prefers in the Civil Court a claim like that of the present plaintiff without having first taken the steps mentioned in Section 106 of Act X. of 1859 for asserting it before the Collector.

This case must be sent back to the Lower Appellate Court for re-trial, subject to the above remarks.

The 9th August 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Limitation—Application for execution of decree.

Case No. 238 of 1865 under Act X. of 1859.

Miscellaneous Appeal from an order passed by the Judge of Mymensingh, dated the 15th February 1865, affirming an order passed by the Deputy Collector of that District, dated the 7th November 1864.

Bimola Debia Chowdhrain and another (Decree-holders), *Appellants,*

versus

Nilkant Sein and others (Judgment-debtors), *Respondents.*

Baboo Kalee Kishen Sein for Appellants.

No one for Respondents.

An application for the execution of a decree under Act X. of 1859 cannot be complied with under Section 92 after the expiry of 3 years from the date of the decree, on the ground of intermediate applications and proceedings in execution.

THIS is an application for the execution of a decree under Act X. of 1859, after the expiry of three years from the date of the decree. The Judge holds that, notwithstanding certain intermediate applications and proceedings in execution, this application cannot be complied with under the provisions of Section 92, Act X. of 1859, and we consider that the Judge's opinion is correct. It is contended that the words of the above Section refer only to a first application for execution. We think that the object of the law was to oblige parties holding decrees for rent under 500 rupees to execute their decrees within three years; and, if they failed to do so, the decree, or so much of it as remained unsatisfied, became infructuous. Under this view of the law, we reject the appeal.

The 10th August 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Notice of enhancement—Service of, by farmer instead of by Zemindar.

Case No. 1169 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 11th February 1865, affirming a decision passed by the Deputy Collector of that District, dated the 19th August 1864.

Binode Lal Ghose (Plaintiff), *Appellant,*

versus

Mr. Mackenzie (Defendant), *Respondent.*

Baboos Banee Madhub Banerjee and *Oopendur Chunder Bose* for Appellant.

Mr. G. C. Paul and *Baboo Mohinee Mohun Roy* for Respondent.

According to Section 13, Act X. of 1859, a notice of enhancement must be served by the farmer, and not the zemindar, as the person to whom "the rent is payable," notwithstanding an agreement between the zemindar and the farmer, by which the zemindar reserved to himself the right of serving notices of enhancement.

WE have heard both parties fully on this appeal. We agree with the Lower Court that the relation of landlord and tenant has not been established, and that the notice has not been served on the defendant in the mode contemplated by law. The plaintiff, it is true, made an agreement with the farmer, his own lessee, by which he reserved to himself the right of serving notices of enhancement, and of benefiting by the enhanced rents, under the law as it then stood, subject only to the effect of any future laws. Now, after the agreement, Act X. came into operation, and by Section 13 of that enactment the notice must be served by the "person to whom the rent is payable." We agree with the Judge that by this term is meant the ordinary rent, or the rent payable for the past year; the future enhanceable rent was not intended. The law, which was intended to simplify matters between landlord and tenant, could never have meant to provide for complications of this kind. Reading, then, the words in this light, and holding them to be precise, clear, and imperative, we think that the notice, to have been legal, should have been served by the farmer, as the only person who stood, to the tenant sued, in the light of landlord at the time.

In this view, we confirm the decision, and dismiss the appeal with costs.

The 10th August 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Order of Judge admitting insufficiently stamped document—No Special Appeal from.

Case No. 980 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 10th January 1865, reversing a decision passed by the Deputy Collector of that District, dated the 29th August 1864.

Goluck Chunder Sein (Plaintiff), *Appellant,*

versus

Sheikh Khan Mahomed Khansama and another (Defendants), *Respondents.*

Baboo Bungseedhur Sein for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

Under Clause 1, Section 17, Act X. of 1862, no special appeal lies from the order of a Judge admitting an insufficiently stamped pottah on payment of full stamp and penalty.

THE point sought to be taken is that the Judge was wrong, under the law applicable, in admitting the pottah insufficiently stamped, on payment of the full stamp and fine. But the pleader for the appellant has omitted to note that, under Section 17, Clause 1, of Act X. of 1862, the order of the Judge, admitting the document, is final. This is conclusive, and bars the present appeal; and, no other point being pleaded, we dismiss the same with costs.

The 10th August 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Jurisdiction (of Civil Court)—Claim for sale of Pan on Haut days.

Case No. 1031 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 30th November 1864, affirming a decision passed by the Deputy Collector of that District, dated the 12th August 1864.

Hurrish Chunder Koond (Plaintiff), *Appellant,*

versus

Gopal Barooye and others (Defendants), *Respondents.*

Baboos Tarrucknath Sein and *Dwarkanath Mookerjee* for Appellant.

Baboo Khetter Mohun Mookerjee for Respondents.

A claim for a legal due or cess arising out of the privilege of selling pân on hâut days is cognizable in the Civil Court, and not in the Collector's.

WE have heard the pleader for the appellant, but are convinced that the view of the Judge is correct. There is no kubooleut held by the plaintiff from the defendants for the year claimed, nor is there any specific portion of land said to be held by the defendants for the purpose of selling *pân.* The claim is not, therefore, one on land. It is a claim for a legal due or cess arising out of the privilege of selling *pân* on hâut days. As such, it would be cognizable in the Civil Court. The case reported at page 453 of Hay's Reports, 17th November 1862, seems exactly in point. The decision of the Deputy Collector, which was without jurisdiction, is set aside, and this appeal is dismissed with costs.

The 11th August 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Remand for trial on merits, no bar to decision on issue of limitation.

Case No. 166 of 1865 under Act X. of 1859.

Regular Appeal from a decision passed by the Collector of Howrah, dated the 23rd February 1865.

Rajah Tej Kishen Roy (Plaintiff), *Appellant,*

versus

Shib Chunder Bose (Defendant), *Respondent.*

Baboo Nil Madhub Sein for Appellant.

Baboo Banee Madhub Banerjee for Respondent.

The remand of a case for trial on the merits (after an affirmative decision on the point of jurisdiction) does not prevent adjudication upon any other issue arising in the case (*e. g.*, the issue of limitation).

THIS was a suit brought by the zemindars of Bar Bosoondree Dossur against the heirs

of the surety of a naib, for monies received by the said naib in the course of his employment. The amount involved in the suit was Co.'s rupees 13,241-13-13, and the claim was made under the provisions of Section 24, Act X. of 1859.

Date of plaint, 17th Pous 1268 B. S.

The Deputy Collector of Howrah held that a suit of this nature would not lie under the provisions of Section 24, Act X. of 1859, against the heirs of the surety. The case was struck off the file as not cognizable.

On appeal, this Court (present Justices Norman and Seton-Karr) remanded the suit on the 30th August 1864. The Court observed that, "on a careful consideration of the "terms of the surety-bond, they were of opinion "that the liability of the heirs of the surety "was not determined by his death; and that "the suit was properly brought under Sec-"tion 24 of Act X. of 1859 before the Collec-"tor." The case was remitted for trial on the merits.

The Deputy Collector held that, as the agency of the naib terminated in the month of Bhadro 1267, and the present suit was not brought until Pous 1268, it was barred under the provisions of Section 33 of the Act.

In appeal it is contended that, as this Court remanded the suit for trial on the merits, the Lower Court was wrong in taking up the point of limitation and dismissing the case.

This Court, it is true, remanded the case, but solely because it was of opinion that the Collector had jurisdiction. There was nothing in the order of remand to prevent an adjudication upon any other issue which might arise in the case.

The pleader for the respondent in the Court below took the objection that the suit was barred, and the plaintiff did not appear to have been taken by surprise, for evidence was adduced by him to attempt to prove that the incumbency of the naib lasted beyond Bhadro 1267 B. S.

We have read the evidence on the point, and entirely concur with the Lower Court that it is quite insufficient to establish the averments of the plaintiff that the agency of the naib extended beyond Bhadro 1267. In the plaint it is stated that the naib was employed *for a few days* in 1267 B. S., and that he died in Magh.

The suit having been admittedly brought in Pous 1268, and the agency of the naib having clearly determined in Bhadro 1267, the suit is beyond time (*vide* Section 33, Act X. of 1859), and has been properly dismissed. We observe that one of the witnesses for the plaintiff admits that the naib became a lessee of the estate in dispute in Bhadro 1267 B. S.; but we are asked to believe that, though lessee, he acted in his capacity of naib. This averment is most improbable, and has not been proved.

We dismiss the appeal with costs and interest payable by the appellant.

The 11th August 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Jurisdiction—Suit for rent in respect of unassessed jummai land.

Case No. 123 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Additional Judge of Nuddea, dated the 16th December 1864, reversing a decision passed by the Assistant Collector of that District, dated the 3rd September 1864.

Mirzan Biswas (Defendant), *Appellant,*

versus

Mr. R. T. Hills (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellant.

Mr. A. F. Lingham for Respondent.

A suit will lie under Act X. of 1859 for arrears of rent in respect of *jummai* land on which no rent has yet been assessed, the rate being fixed according to the rates prevailing in the market for similar land.

In this case a suit for arrears of rent has been preferred against the defendant, on the allegation that he has been holding possession of 70 beegahs of land, which are not included within his *jummai* land. The first Court dismissed the suit, on the ground that such a suit would not lie until rent had been regularly assessed on the land after due notice under Section 13, Act X. of 1859. The Appellate Court overruled this objection, and awarded the plaintiff a fair rate of rent, because the defendant admitted that the land, for which rent was demanded, was a portion of his *jummai* land.

The first ground taken on special appeal is that, as no rate of rent has been fixed or arranged between the parties as respects this land, the plaintiff cannot recover rent for that

land, and that no suit will lie under Act X. of 1859. We observe that it is admitted that the plaintiff and defendant stand in the position of landlord and tenant as respects *other* land in the village. It is said that they do not hold that position as respects *this* land. But there exists in the district of Kishnagur a custom under which tenants can cultivate land which is not directly let out to other tenants, but remains "*khas khamar*," on payment of certain high rates of rent. In the case of such tenants, there exists an implied agreement between the parties that such rent shall be paid; and the amount of land so cultivated and the rent to be paid for it are ascertained each year by actual measurement. The lands in question are called "*ootbundee*" lands, and the rents are calculated at what are called *ootbundee* rates. The plaintiff in this suit has sued for the rent of the excess land held by the defendant at *ootbundee* rates; but he had not calculated the rent only upon the land which has been cultivated by the tenants as ascertained by annual measurement, but by a general rate on the *whole* land. The plaintiff has been obliged to adopt this plan, because the defendant held the land secretly, and without the cognizance of the plaintiff. We think that, under the circumstances, the plaintiff is entitled to rent for the land, and that a suit under Act X. of 1859 will lie for arrears of rent; but that that rent must be calculated, not according to *ootbundee* rates, but at the rates prevalent in the market for *jummai* lands. The Judge has followed this rule, and we, therefore, see no reason to interfere with his judgment, and dismiss this appeal with costs.

The 11th August 1865.

Present:

The Hon'ble J. B. Phear and E. Jackson, *Judges.*

Enhancement—Rule of proportion (not applicable to certain cases)—Principle of assessment not affected by magnitude of present holding.

Case No. 11 of 1864 under Act X. of 1859.

Regular Appeal from a decision passed by Mr. R. T. Sevestre, Deputy Collector of the 24-Pergunnahs, dated the 15th October 1863.

Jadub Chunder Holdar (Defendant), *Appellant,*

versus

Etburry Lushkur and others (Plaintiffs), *Respondents.*

Baboos Unnodapershad Banerjee, Sreenath Doss, and *Mohesh Chunder Chowdry* for Appellant.

Baboos Banee Madhub Banerjee and *Obhoy Churn Bose* for Respondents.

The rule of proportion is not applicable where the rates between the present value of the produce of the soil and the former value of the time of the original taking cannot be ascertained, and where it is only necessary to see what is a fair and equitable rate by comparison with the rate paid by the neighbouring ryots for similar or similarly situated land.

The mere magnitude of the present holding does not introduce any special principle of assessment. The original takings having been as by a ryot occupier, in the absence of any evidence to the contrary, the assessment of rent must be made on the supposition that the tenure is still of that character.

THE plaintiffs brought this suit to contest their liability to the enhancement of rent, for which the defendant gave due notice under Section 13 of Act X. of 1859.

It was decided in the first instance by the Deputy Collector on the 3rd June 1862; but on appeal to this Court it was remanded in order that, among other things, "the "Lower Court might fix the rates upon "some better *data* than the arbitrary one "assumed. The rates prevailing in the "neighbouring khas mehals for lands of a "similar description, and enjoying similar "advantages, will form a good guide to "the Lower Court in fixing what is a fair "and equitable rate."

On re-hearing the case, under this remand order, the Deputy Collector enquired into and found the rates prevailing in the neighbouring khas mehals, and he decreed an enhancement to the extent of one-sixth of the excess of these rates beyond that previously paid by the plaintiffs in respect of the corresponding descriptions of land.

Against this decision the defendants now appeal, and the plaintiffs also raise a cross-appeal.

It is needless for us to say that the principle upon which the Deputy Collector has arrived at his rates of enhancement is not to be found laid down in the case of Hills *versus* Essur Ghose; neither is it in any way to be deduced from the late ruling of the Full Bench of this Court. The decision of the Deputy Collector is obviously founded upon a misapprehension of the law, and is incapable of being supported.

Both sides are content that the Deputy Collector's finding, as to the several rates of rent paid for neighbouring lands as respectively described by him, should be taken as true. This, however, does not afford us any guide towards ascertaining

the rates between the present value of the produce of the soil, and the former value at the time of the original taking; and we cannot directly apply the rule of proportion lately prescribed for cases of this kind by the Full Court. But we think the issue laid down in this case by the High Court on remand does not require the application of that rule. We have to see, by a comparison with the rates paid by the neighbouring ryots for similar or similarly situated land, what it would be fair and equitable that the plaintiffs should pay. And, on a full consideration of the various findings of the Deputy Collector, and of the depositions from which they were deduced, we are of opinion that the rate for the paddy land ought to be enhanced to 3 rupees a beegah; and, as the parties have made no contest in respect of the rates for the remaining descriptions of land, that they should be those fixed by the Deputy Collector, namely, 3 rupees 6 annas for high land, 2 rupees 5 annas for the dwelling-house land, 7 pie for tank land, and 1 anna for garden land.

We may add that we do not consider the mere magnitude of the plaintiff's present holding to introduce any special principle of assessment. The original takings were all as by a ryot occupier, and the assessment of rent must, in the absence of any evidence to the contrary, be made on the supposition that the tenure is still of that character. If it has been *changed* to that of a middleman, and there be any distinction as regards the rates of assessment in the two cases, no evidence on this point has been laid before us.

The 15th August 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Jurisdiction—Suit for possession by purchaser from Tenant whose right to sell is questioned by Zemindar.

Cases Nos. 773 and 774 of 1862 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Rajshahye, dated the 23rd January 1862, modifying a decision passed by the Deputy Collector of Pubna, dated the 2nd July 1861.

Kanaye Mollah (Plaintiff), *Appellant,*

versus

Debnath Roy and another (Defendants), *Respondents.*

Baboo Juggadanund Mookerjee for Appellant.

Baboos Banee Madhub Banerjee and *Anund Chunder Ghosal* for Respondents.

A suit for possession by a purchaser from a tenant whose right to sell is questioned by the zemindar is cognizable only in the Civil Court, and not under Clause 6, Section 23, Act X. of 1859.

THE petitioner in this case brought a suit against the zemindar to obtain possession of a 12-anna share of 62 beegahs, the jote of his vendor. His allegation is that, having purchased the right and title of a 12-anna share of the jote from the tenant Sumeer Uldeen, he tried to take possession, but was prevented doing so by the zemindar. He brought a suit in the Moonsiff's Court, and was successful. An appeal was preferred by the zemindar; and the Principal Sudder Ameen, on 1st February 1861, held that such a suit did not lie in the Civil Court, but should be brought under Section 23, Act X. of 1859, and directed the plaintiff to bring his action before the Collector. Instead of filing a special appeal from this order, the plaintiff brought his action as directed in the Collector's Court on 3rd May 1861, and was again successful to a certain extent. An appeal was preferred to the Judge, and the question of jurisdiction was again raised, and the Judge held that the Civil Court was the proper *forum* for plaintiff to bring his suit. Plaintiff has now brought a special appeal in both cases, and, under the circumstances, we enlarge the time for filing the appeal in the first case.

The plaintiff has never been in possession, and he cannot get possession because the defendant, zemindar, will not recognize the right of the tenant to sell. The case does not, therefore, come under Clause 6, Section 23 of Act X. of 1859. There is also a question of the tenant's right to sell involved. Plaintiff asserts that the tenure is saleable. Defendant apparently denies the rights of the vendors altogether. We concur with the Judge in thinking that such a suit should be brought in the Civil Court. We therefore dismiss the appeal from the Judge, No. 773, but without costs; and in No. 774 we reverse the order of the Principal Sudder Ameen, and remand the case for trial on the merits.

The 15th August 1865.

Present :

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Suit for rent—Personal appearance of plaintiff or defendant—No appeal from order of dismissal for default.

Case No. 813 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 7th January 1865, affirming a decision passed by the Collector of that District, dated the 29th September 1864.

Sheikh Golam Bukshee (Plaintiff), *Appellant,*

versus

Pulton Sing and others (Defendants), *Respondents.*

Mr. J. Baptist for Appellant.

No one for Respondents.

Section 42, Act VIII. of 1859 (prohibiting the summoning of a plaintiff or defendant, residing more than 50 miles from the place where the Court is held, to attend in person unless he is within the jurisdiction of the Court), is applicable to suits for rent under Act X. of 1859.

No appeal lies from a Collector's order dismissing a suit for default on the non-appearance of the plaintiff after being summoned. The proper course for the plaintiff is to apply for the revival of his suit, showing cause why he should not have been summoned, and why the Collector's order was defective.

In this case the plaintiff brought a suit for rent under Act X. of 1859. A third party appeared and claimed the tenant as his. Evidence was gone into under Section 77, and the plaintiff was then summoned to give evidence. He did not attend, and the Collector dismissed the suit, and the Judge refused to admit an appeal on the ground that no appeal would lie where a case is struck off under Section 64, Act X. of 1859.

In special appeal, it is urged, *first*, that the case was not struck off, but dismissed; and, *secondly*, that the Collector's order, requiring the personal attendance of the plaintiff, was illegal under the provisions of Section 42, Act VIII. of 1859, which declares that no plaintiff or defendant shall be ordered to attend in person, who at the time is *bonâ fide* residing at a distance of more than fifty miles from the place where the Court is held, unless he be resident within the limits of the jurisdiction of the Court; that plaintiff, when the summons was issued, was residing in Calcutta, attending his duty as a mookhtear in the High Court, and, therefore, he was not bound to appear.

By Section 67 of Act X. of 1859, the Regulations and Acts for the time being in force, for procuring the attendance of witnesses, and for the examination, remuneration, and punishment of witnesses, whether parties to the suit or otherwise, are declared applicable to suits under Act X.; and, therefore, we think that the provisions of Section 42, Act VIII. of 1859, quoted above, is applicable to plaintiffs who are summoned to give evidence in suits for rent. The Collector's order was passed under Section 64, Act X. of 1859. He dismissed the suit as in a case of default; and the proper course to be taken by the plaintiff was to apply for a revival of his suit, showing cause why he should not have been summoned, and why the Collector's order is defective. This was the proper course, and the one which he ought to pursue now. Appeal rejected.

The 16th August 1865.

Present :

The Hon'ble H. V. Bayley and G. Campbell, *Judges.*

Notice of enhancement (by Farmer on behalf of Zemindar)—Presumption of uniform payment from Permanent Settlement—Pleadings.

Case No. 1105 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 26th January 1865, affirming a decision passed by the Deputy Collector of that District, dated the 29th July 1864.

Hem Chunder Chatterjee (one of the Defendants), *Appellant,*

versus

Poorun Chunder Roy and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboos Hem Chunder Banerjee and *Khetternath Bose* for Appellant.

Baboos Oopendur Chunder Bose and *Isrur Chunder Chuckerbutty* for Respondents.

A notice of enhancement by a farmer as agent and on behalf of the zemindar is legal.

A defendant is not precluded from the benefit of the presumption under Section 4, Act X. of 1859, because he does not plead in words a tenure *from the Decennial Settlement.* A plea that the tenure was the *grandfather's* or *inherited* by the *successors,* and *of long standing,* is sufficient.

In this case, plaintiff sued to enhance defendant's rent, alleging in the notice the

following two grounds as those under Section 17, Act X. of 1859: *viz.*, *1st*, that the productive powers of the soil had increased from causes other than the agency of the ryots, and, *2ndly*, that there was the proximity of the Railway. Reference to the neighbouring rates is made only incidentally, and not as a distinct ground of enhancement. The plaintiff, it may be here remarked, is at the same time the farmer and the agent for the zemindar.

Defendant pleaded that he had paid a uniform rate of rent, and was, therefore, protected under Section 4, Act X. of 1859; that the land was held at the said fixed rates by his grandfather, and these came to him by *inheritance*, from what exact period he could not say; but that it was a tenure of "long standing." It also was pleaded by defendant that one beegah was held as rent-free.

The first Court (the Deputy Collector) held that, from the collection-papers of different dates, the defendant's jumma was shown to be a variable one; it also held that the notice referred to the fact of the rent paid by defendant being below that prevailing in the neighbourhood for lands of a similar quality. The first Court then held that the productive powers of part of the land had increased owing to the agency of the ryot; that there was also a greatar value for produce; and that, allowing the ryot the benefit of his own agency in improving the land, the prevailing rates of the neighbourhood (which the Deputy Collector specifies) should be followed, and the Deputy Collector gave plaintiff a decree accordingly.

As to the one beegah of lakheraj, the first Court remarked that no allegation or proof as to it was given by defendant, and it could not, therefore, be exempted from the operation of the above decree.

On appeal to the Judge, the case was remanded to the Deputy Collector, in order that the latter might enquire more fully into the question of whether the one beegah referred to was valid rent-free or not. This one beegah was then proved, on measurement, to be 1 beegah 3 cottahs, and to be within the boundaries given in the notice. The Deputy Collector held that the defendant had to prove, and had not proved by his documents, the 1 beegah 3 cottahs to be rent-free, and that the oral testimony of defendant's two witnesses on this point was not sufficient.

Defendant appealed to the Judge, who recorded the points to be decided by him, as, *firstly*, whether plaintiff as farmer could sue on behalf of the zemindar; *secondly*, whether enhancement was precluded by the presumption in defendant's favor under Section 4, Act X. of 1859; *thirdly*, whether any portion of the land was rent-free; and, *fourthly*, whether the right to enhance existed, and, if so, at what rates the enhancement should be made. On the *first* point the Lower Appellate Court held that, the notice being on behalf of the zemindar, plaintiff could sue. On the *second* point it held that, as defendant had not specifically pleaded that he held from the time of the Decennial Settlement, the presumption under Section 4 could not avail defendant. On the *third* point, the Judge held that, as defendant admitted the 1 beegah 3 cottahs to be within *what was his jote*, it was for him (defendant) to prove that he held rent-free, and that, as defendant had adduced only oral evidence, this was not sufficient, and "that his documents were not attested," "*while plaintiff does prove that this plot was part of the jote for which he (defendant) paid rent.*" The Judge notices that it was not pleaded below that the zemindar could not sue, as the mehal was let out in farm, and, therefore, he would not admit the plea; and, finally, that, the Deputy Collector's rates appearing fair and equitable, plaintiff should have a decree accordingly.

From this decision the defendant appeals specially, urging—

1. That it was for plaintiff to prove that the 1 beegah 3 cottahs was, as plaintiff alleged, *mdl.* The Full Bench ruling of this Court of this year was cited in support of this plea.

On this point, we may observe that the Judge has found as a fact (in the passage above cited in inverted commas) *that plaintiff has proved the 1 beegah 3 cottahs to be mdl as he alleged.* It was, however, we remark, for the defendant setting up a lakheraj title to show its *existence* as such rent-free land. We accordingly overrule this objection.

2. That the notice, if in behalf of the zemindar, was not correct, as the zemindar did not hold the property, but the farmer.

We think the notice is perfectly legal. There is no doubt that the notice is on behalf of the zemindar, and further there is no doubt that the zemindar can sue to enhance on such notice.

3. That the Judge is wrong in holding absolutely that defendant cannot have the benefit of Section 4, because he did not specifically state the words "from the Decennial Settlement" in his pleading, inasmuch

as defendant's plea is substantially the same thing.

Now, looking at the statement of the defendant, *recorded by the Deputy Collector*, we think (in accordance with other Benches of this Court) that the plea that the tenure was *the grandfather's*, and *inherited* by the *successors*, and of "*long standing*," is enough to be considered a sufficient pleading of a tenure of the time of the Decennial Settlement.

But it is quite true that the special appellant pleaded that the productive powers of the land are increased *by his own agency*. On this the Judge gives no decision.

We, therefore, remand this case to be retried by the Judge, with reference to these remarks, *i. e.*, we think that the Judge should not have held defendant precluded from the benefit of Section 4 only, because he did not specifically plead a tenure in words *from the Decennial Settlement*, but should see if the documentary and oral testimony support such a holding of 20 years as to give the defendant the benefit of the legal presumption provided by Section 4. The Judge should also record whether it be proved or not that the productive powers of the land were increased by the *defendant's agency*.

The Judge must re-decide the case accordingly; the ground of the increase of the productive powers of the land being a legal plea apparently in this case.

The 17th August 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Date of hearing of suit—Holidays.

Case No. 680 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 18th November 1864, affirming a decision passed by the Collector of that District, dated the 5th August 1864.

Jeebun Monee Dossee (Defendant), *Appellant*,

versus

Tarinee Churn Ghose (Plaintiff), *Respondent.*

Mr. C. Gregory for Appellant.

Baboos Mohendro Lal Shome and *Khetter-nath Bose* for Respondent.

When a long holiday intervenes, a new date should be fixed for the hearing of a cause which was on the list, but not called on before the holiday.

THIS case was appointed to be heard by the Judge on 20th September. It was not taken up on the appointed day, nor at any time before the *Doorga Poojah* holidays; nor was any fresh appointment made; but on 23rd November the Judge took up the case, and, finding the appellant not present, struck it off. This procedure is, we think, illegal. The Judge is bound to keep to the time appointed, or to adjourn the case from time to time to some fixed date. It may be that, when a case is on the Board for hearing on a particular day, and the Court is regularly going down that Board, it is well understood that cases not reached on one day are adjourned to the next day without a separate order in each case, and the parties are, no doubt, under such circumstances, bound to attend *de die in diem* till their cases are reached. But when there is considerable delay, or any interruption of the continuous hearing of the daily cause list for other business, then a new date should be fixed. Much more when the long holiday intervenes, it is necessary that a new appointment should be made. We sustain this special appeal, and remand the case for trial on a date to be duly fixed.

The 18th August 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Lease (Breach of Conditions of)—Special Appeal.

Case No. 1291 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 13th February 1865, reversing a decision passed by the Deputy Collector of that District, dated the 28th December 1864.

Mookta Dossia and others (Defendants), *Appellants*,

versus

Shama Churn Ghose (Plaintiff), *Respondent.*

Baboo Mohendro Lal Shome for Appellants.

Baboos Sreenath Doss and *Kalee Mohun Doss* for Respondent.

Suit by lessor to recover leased premises on the ground of a breach of condition, *viz.*, sale of tenure. The lessee allowed judgment to go by default, and his vendee was admitted, on his own

plication, to defend as intervenor. HELD that neither e lessee nor his vendee had a right of special appeal.

THE plaintiff in this case (lessor) sues s lessee, under Clause 5 of Section 23 of & X. of 1859, to recover possession of the ased premises, on the ground that the lessee d committed a breach of condition, which titled the lessor to eject him.

The condition relied on was that the ssee would not sell his tenure, and it is dmitted that he certainly did sell it.

The lessee never appeared in the suit, but s vendee was admitted on his own applicaon to defend as intervenor.

The Lower Appellate Court decreed nerally in favor of the plaintiff, finding, as clearly a fact, that the lease forbade the ienation of the premises, and declared that y attempt to alienate should be a void act.

Both defendants appeal specially; but we ink that the lessee, defendant, having lowed judgment to go by default, has no ht of appeal in this Court, but must, if so vised, proceed to rectify the judgment ainst himself by the method prescribed r defaulters in Act X. of 1859. And, rther, we think that, as the intervenor, fendant, is admittedly an entire stranger the subject of suit, taking no rights from e lessee as against the plaintiff, and has ly appeared in the suit by reason of his n voluntary act, he also has no right of peal.

The appeal is, therefore, dismissed with sts.

The 21st August 1865.

Present:

he Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

egistration of sub-division of tenure by Zemindar, not compulsory.

Cases Nos. 1209 and 1210 of 1865 under Act X. of 1859.

ecial Appeals from a decision passed by the Judge of Moorshedabad, dated the 6th February 1865, affirming a decision passed by the Deputy Collector of that District, dated the 31st October 1864.

R. Watson and Co. (Defendants), *Appellants,*

versus

Ram Soonder Pandy (Plaintiff), *Respondent.*

Messrs. R. T. Allan and *J. S. Rochfort* and *Baboo Onoocool Chunder Mookerjee* for Appellants.

No one for Respondent.

A zemindar is not bound to accept and register any sub-division of a tenure previously registered as undivided.

In this case the plea in special appeal is, that the Judge has erred in holding that it will be for the benefit of the zemindar, special appellant, to accept and register a sub-division of a tenure, and that he must be held bound to do so.

The objection is valid. The law does not require a zemindar to accept and register any sub-division of a tenure previously registered as undivided. Even were it for his benefit, the law does not make it compulsory, but subject to his assent. The policy of the law, too, we may observe, is that the undivided tenure gives the landlord more security for his rents (from which rents he is to pay the revenue) than one split up into smaller portions.

In this view we reverse the Judge's decision, and decree this appeal, and dismiss plaintiff's suit.

The 21st August 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Jurisdiction (of Collector)—Appeal from order of Deputy Collector dismissing for default a suit for more than 100 Rs.

Case No. 1076 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 26th January 1865, reversing a decision passed by the Deputy Collector of that District, dated the 26th September 1864.

Ram Chunder Roy (Defendant), *Appellant,*

versus

Modhoo Shoodun Mookerjee (Plaintiff), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

No one for Respondent.

A Collector acts without jurisdiction in treating an order of a Deputy Collector dismissing, for default, a suit for more than 100 rupees, as a Miscellaneous order appealable to him under Section 103, Act X. of 1859, and restoring the case. The appeal from the Deputy Collector lies, not to the Collector, but to the Judge.

THIS was a suit for the delivery of accounts and a demand for Rs. 684 in the

hands of the defendant, the gomashtah of the plaintiff. Defendant pleaded payment, and filed a receipt, which the Lower Appellate Court declared to be not genuine, and, reversing the judgment of the first Court, gave a decree for plaintiff.

In special appeal it is urged that a suit for the same papers and money was instituted in No. 6 of 1863-64 before the Deputy Collector; that 4th February 1864 was fixed for the hearing of the case; that it was postponed to the 2nd March, and, on that day, owing to the absence of the plaintiff, the suit was dismissed for default; that the present case, No. 1 of 1864-65, was instituted in the year following for the same papers and amount of money; that the plaintiff was required to produce some documentary evidence which he failed to do, and the case was dismissed for default on 27th July 1864; that the plaintiff appealed to the Collector, who ordered the case to be restored to the file, treating the order passed as a Miscellaneous order; that it was taken up by the Deputy Collector, and the claim was dismissed; but this order was reversed by the Additional Judge, who, in his judgment, stated that the Collector acted rightly in reversing the order of the Deputy Collector, and restoring the case to the file; that, whether the Deputy Collector's order, dismissing the case for default, be considered an order or a judgment, no appeal lay to the Collector, and, therefore, the appeal to him and his order thereon were altogether irregular, and those proceedings must be considered illegal and void.

The pleader for the special appeal admits that the first ground taken before us was not brought forward as an objection to the present suit in the Lower Court. We shall, therefore, take no further notice of it.

With regard to the Collector's order, restoring the present case to the file after it had been once struck off for default by the Deputy Collector, we think it to be altogether illegal. The suit is for a sum above Rs. 100. The Deputy Collector required the plaintiff to produce certain evidence to substantiate his claim, which he failed to give, and the Deputy Collector passed an order which was, in fact, a judgment dismissing the case for default. He struck off the case for default. An appeal was preferred to the Collector, who says that he does not look upon this order as a judgment, but as a mere Miscellaneous order; that the Deputy Collector was giving needless trouble to the plaintiff in requiring him to produce those papers; and he, therefore, reverses his order, and directs the case to be restored to the file, and proceeded with.

We think the Collector was altogether wrong in treating the order of the Deputy Collector, dismissing the suit for default, for such it was in fact, as a Miscellaneous order appealable to him under the provisions of Section 103, Act X. of 1859. The order had the effect of dismissing the plaintiff's claim, and consequently was to all intents and purposes a judgment. The claim was for more than Rs. 100, and consequently the appeal lay, not to the Collector, but to the Judge. The Collector's order, therefore, restoring the case, was altogether without jurisdiction and illegal, and must, with all subsequent proceedings, be set aside as void. The Judge, in the remarks he has made, upholding the order of the Collector, appears to us to have misread the law, and mistaken the effect of the decision of the first Court. We accordingly reverse the judgment of the Court below, as well as the Collector's order restoring the case, and all subsequent proceedings, and decree this special appeal with costs.

The 23rd August 1865.

Present:

The Hon'ble J. B. Phear and E. Jackson, *Judges.*

Enhancement (of Howala tenure)—Intervenors—Notice of enhancement.

Cases Nos. 1101, 1102, and 1103 of 1865 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Backergunge, dated the 27th and 26th January 1865, reversing the decisions passed by the Deputy Collector of that District, dated respectively the 28th July and 6th August 1864.

Issur Chunder Bhuttacharjee and others (Intervenors), *Appellants,*

versus

Bhyrub Chunder Shaha and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboo Kalee Mohun Doss for Appellants.

Mr. R. T. Allan and *Baboo Onoocool Chunder Mookerjee* for Respondents.

Suit for the enhancement of rent on certain Howala tenure in which third parties intervened as auction-purchasers and as tenants in possession. HELD that there is nothing in Act X. of 1859

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restricting the right of third parties to intervene until a tenure is put up for sale; but that, where it appears that their rights and interests will be affected by the Collector's decision, they are entitled to assert those rights before that decision is given.

HELD also that the landlord was not bound to serve notice of enhancement on the intervenors unless on proof of his recognition of them as his tenants; and that registration and receipt of rent are not the only proof of such recognition; but that possession for 14 years under a public transfer, and the payment of rent to the landlord's co-sharer, are indisputable evidence of the intervenors' right to be the tenants.

THESE are suits for enhancement of rent The defendants against whom the suits are preferred, and upon whom the notices of enhancement were served, did not contest the actions. But third parties intervened, alleging that they purchased these tenures at public auction fourteen years ago, and that they are in possession with the knowledge and with the consent of the plaintiff, and that the plaintiff is endeavouring to enhance the rents of their tenures by a secret side action against the old tenants. They urged that, as no notices of enhancement had been served upon them, the plaintiff's suits should be dismissed.

The Judge on this question held as follows: "If the intervenors can show that "the plaintiffs accepted them as tenants by "receiving rents from them, then certainly "the notice of enhancement was served on "the wrong parties, and is void; but, if "intervenors do not prove such substantial "recognition of their tenancy, then, as inter-"venors were avowedly not the registered "tenants, the landlord was quite right in "issuing the notice on the defendants. "Now, intervenors have not proved such "recognition of their tenancy by receipt of "rents, and the petition in Court is not "sufficient proof of such recognition. "Therefore, the notice was rightly served "on the registered tenants, *i. e.*, the de-"fendants." The Judge then goes on to decree the suits, the defendants not having contested the plaintiff's claim to enhancement.

The intervenors appeal. They again urge that they are the tenants of the tenures the rents of which the plaintiffs seek to enhance, and that the plaintiffs were fully aware that they were the tenants, and, therefore, that the rents cannot be enhanced unless notices of enhancement are first served upon them.

Mr. Allan for the plaintiffs has endeavoured to support the Judge's ruling that, as the intervenors are not registered tenants, and the plaintiffs have never recognised them as tenants by receiving rent from them the plaintiffs were right in law in serving their notices on the parties whose names are registered as tenants in their rent-rolls. Mr. Allan also argued that the intervenors had mistaken the form in which alone they could have intervened, and should have waited until the tenure was put up to sale, and then preferred their claims under Section 106, Act X. of 1859.

On the latter point, we are of opinion that, as the intervenors might raise their objections at the late stage of the proceedings indicated by Mr. Allan, so also they could raise those objections at the earlier stage at which they appeared in Court. It is true that Act X. of 1859 does not, like Act VIII. of 1859 in its Procedure Clauses, lay down any special rules under which third parties can intervene in a suit to which the plaintiff has not made them parties; but the practice, both of this Court on appeal and of the Lower Courts, has always been to allow of such intervention upon its being made to appear *primâ facie* that the intervenors have rights and interests which will be affected by the Collector's decision in the suit, and the absence of any special Clause in the Acts on the subject may be held to sanction such a procedure, inasmuch as the law does not forbid it, and the direct result of the Collector's decision being a dealing *in rem* with the subject of suit, and it not being confined to an adjudication of abstract rights between the mere parties to the suit, it is reasonable to suppose that the Legislature intended that all persons concerned in the actual subject-matter should have the opportunity of asserting those rights previous to that decision being given. In this country secret actions by plaintiffs to endeavour to gain their ends without contest by leaving out from the action the parties principally interested in it are so common, that, for the prevention of fraud, it is frequently necessary that the parties really interested in a suit should be made parties to it, even though the plaintiffs have not made them parties, and wish to carry on the suits in their absence. It may be that the intervenors would not be injured by suits carried on behind their backs, or, at any rate, might have a remedy for the injury in the shape of a suit, and that it would, therefore, be the most preferable course for them to adopt, not to intervene. But it is difficult for a third person, who is aware that such a suit, fraudulently directed against his interests, has been preferred, to remain quiet; and indeed

it might be held that his knowledge of such a suit and apparent acquiescence in it was a virtual admission on his part, the effect of which it would be afterwards difficult for him to remove. We, therefore, hold that the intervenors were correctly made parties to these suits.

Upon the first issue, which is raised between the intervenors and the plaintiffs, *viz.*, as to whether these suits should be dismissed, because the notices of enhancement were not served upon the intervenors, we think that the Judge was right in ruling that the determination of that issue depends on whether there has been a recognition of the intervenors as tenants, but he is wrong in laying down that such recognition can be proved only by registration or by the receipt of rent. Other evidence may prove recognition as fully as those facts; and the question, as to whether there has been recognition or not, must depend on the evidence in each case. It is a question of fact, and not of law. It is said in this case that the intervenors purchased the tenure from the old tenants at a public sale, and that the plaintiffs drew out a portion of the money which intervenors paid for their purchase; that intervenors have for fourteen years been in possession of the tenure since their purchase, and have paid the rents for a portion of the tenure to the plaintiff's co-sharers in the zemindary. These facts have not been considered by the Judge. We think that, if the intervenors can prove these facts, they will have made out a sufficient recognition of their position as tenants, whether the plaintiffs received rent from them or not. They would prove that the plaintiffs were fully aware that the intervenors were the *de facto* tenants, a Howala being a transferable tenure, and the possession for fourteen years under a public transfer and the payment of rent to a co-sharer in the estate being indisputable evidence to the intervenor's right to be the tenants. It is said that, under certain Sections of the Act, every under-tenant is bound to register his tenure in the serishtah of his landlord. This may be, but no special penalty is laid down for non-registry. It may be that an under-tenant may take the risk of injury which he may incur in consequence of non-registry. But the Act in Section 12, which relates to notices of enhancement, does not lay down that such notices shall be served only on the registered tenant, or that such notices shall be sufficient for the purposes of the Act, if served on the registered tenant. That Section lays down that the notice shall be served on the tenant, that is, on the person whom the zemindar knows to be the actual tenant.

We think the decision of the Judge, confined as it is to the question of recognition, as founded on registration or receipt of rent by plaintiffs, is not a sufficient determination of the issue which has been raised between the plaintiff and the intervenors, and that the case must be remanded to him to ascertain whether the provisions of Section 13, Act X. of 1859, have been complied with, and the notices have been served on the tenant, whose *status* as tenant has been sufficiently proved. If this is found in the intervenor's favor, the suits should be dismissed. If it is found against the intervenors, the notice of enhancement on the old tenant will be considered a sufficient notice on the intervenors. The suit must be treated as being fairly launched as against the intervenors as well as against the original defendants, and the decree must follow the result of the issues upon the merits between the plaintiff and the intervenors which, we would observe, have not as yet been tried by the Judge.

The costs of this appeal will follow the final judgment in the case.

The 23rd August 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Ameen's report (as to rent of previous years).

Case No. 1236 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Mymensing, dated the 11th February 1865, reversing a decision passed by the Collector of that District, dated the 6th December 1864.

Anund Moyee Chowdhrain (Plaintiff), *Appellant,*

versus

Moneekurnicka Chowdhrain (Defendant), *Respondent.*

Baboo Onoocool Chunder Mookerjee for Appellant.

Baboo Kalee Mohun Doss and *Kalee Kishen Sein* for Respondent.

HELD that the Judge in this case (in which the rents decreed for previous years had still to be ascertained when the decree was given) should have postponed the decision till the Ameen had ascer-

tained what was the proper rent of the land for the previous years.

THE Judge in this case (in which the rents decreed for previous years had still to be ascertained when the decree was given) should have postponed the decision till the Ameen had ascertained what was the proper rent of the previous years for the lands, and he should have directed the Principal Sudder Ameen in that case to expedite the Ameen's investigation, and at once to decide every objection to the Ameen's report promptly, and then decided this case.

In respect to the suit being superfluous under the facts of this case, we observe that the plaintiff had every right to make her plaint in order to save limitation. The respondent has no equitable grounds at all to argue the contrary.

We decree the special appeal with costs in proportion to the amount eventually decreed, and remand the case for trial with reference to the above remarks.

The 24th August 1865.

Present:

The Hon'ble G. Campbell and A. G. Macpherson, *Judges.*

Special Appeal—Review of Judgment of a former Judge by his successor—Evidence.

Case No. 480 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 2nd December 1864, affirming a decision passed by the Deputy Collector of that District, dated the 20th May 1863.

Shaikh Gholam Hossein (Defendant), *Appellant,*

versus

Okhoy Coomar Ghose and others (Plaintiffs), *Respondents.*

Moulvi Syud Murhamut Hossein for Appellant.

Baboo Grish Chunder Ghose for Respondents.

Though a Judge ought not to admit (merely on the facts and without any new evidence being adduced) a review of judgment passed by his predecessor, yet his doing so is not *per se* a ground of special appeal.

Documentary evidence should not be summarily rejected for want of legal proof, unless the party producing it understands the nature of the proof required, and has had an opportunity of producing it.

THIS was a suit for enhancement of rent. The defendant pleaded uniform payment of rent. The Judge found in his favor in what seems a satisfactory and conclusive judgment. But subsequently another Judge, succeeding him, without any new evidence, admitted a review on the facts, and the case was then decided on those same facts in favor of plaintiff. This Court has often expressed its disapprobation of such an abuse of the power of review; but, except when there is absolutely no ground such as to give jurisdiction within the very wide and vague terms of the present law, we have no power to interfere. It is, however, open to the Court, on the decision after admission of review, to consider the whole case. In this instance the Judge, who decided the case on review, summarily decides against defendant, on the ground that his receipts are unproved. But we find that the defendant himself was examined as a witness, and in general terms testified to the receipts. It was the fault of the Court and of the other party that he was not more particularly examined; and at any rate there is some proof of the receipts upon which the Judge was bound to give an opinion. We may further observe that, strict rules of evidence not being understood in the mofussil, it seems to us altogether inconsistent with justice to reject documents summarily for want of legal proof, without first being clear that the party producing them has been made to understand the nature of the proof required; and has had an opportunity of producing it. Most modern documents are at any rate susceptible of proof by the evidence of the parties producing them, or those from whose custody they come. The persons by whom they purport to be signed ought to be examined on oath, and a comparison of signatures, handwriting, &c., often supplies effective evidence. In this case, too, as remarked by the first Judge, allowance is to be made for the age of some of the receipts. Under all the circumstances, we remand the case for retrial of the issue regarding holding at a uniform rate, after duly considering both the evidence on the file, and any other evidence which the parties may now give.

There is no decision by the Judge regarding the quantity of land, the alleged ground of enhancement and the rates; and, if on the first issue the rent is found to be variable, these points must also be tried.

The 26th August 1865.

Present:

The Hon'ble G. Campbell and F. A. Glover, *Judges.*

Presumption of uniform payment from Permanent Settlement—Enhancement of rent on resumed Lakheraj.

Case No. 1396 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 15th February 1865, affirming a decision passed by the Deputy Collector of that District, dated the 15th September 1864.

Koonwur Raj Coomar Roy (one of the Plaintiffs), *Appellant,*

versus

Assa Beebee (Defendant), *Respondent.*

Baboos Anund Chunder Ghosal and *Sham Lal Mitter* for Appellant.

Baboo Mohendro Narain Bose for Respondent.

To entitle a ryot to the benefit of the presumption of uniform payment from the Permanent Settlement, it is not necessary that he should explicitly plead a holding from the time of the Permanent Settlement. His denial of the right to enhance, and proof of upwards of 20 years' uniform holding, are sufficient.

The assessment of revenue on resumed lakheraj land does not entitle the landlord to claim a re-adjustment of the rents of ryots holding at fixed rates from the Permanent Settlement.

THIS is a suit against a ryot for enhancement of rent. The estate is a resumed lakheraj. The defendant pleaded that his tenure is not liable to enhancement, and filed 21 years' dakhilas at a uniform rent. These being found genuine, and no variation of rent from the time of the Permanent Settlement being proved, the suit was dismissed.

In appeal it is *first* urged that defen did not explicitly plead a holding from time of the Permanent Settlement; but think that his denial of the right to enh and proof of upwards of 20 years' unif holding is quite sufficient to raise this iss

Second.—Appellant urges that, because venue has been assessed on his tenure, he entitled to a re-adjustment of the rent of ryots, and he quotes the decision of a Be of five Judges in the case of Teargal Ba June 10th, 1865. In that case, it was decided, with respect to a talook, that talookdar could not be ejected or subje to arbitrary enhancement, because rev had been assessed on the superior hold It was thrown out that, possibly in s cases, the owner of the resumed lakheraj account of the imposition of revenue, m have an equitable claim to assess a pro tionate amount on a sub-holder; but suggestion is distinctly qualified by the sentence of the judgment as by no mea binding and conclusive opinion. In case, moreover, the under-tenant bein talookdar holding under a contract. Secti of Act X. of 1859 had no application to In this case, the defendant is a ryot w rights are, as the Judge clearly sh regulated by Section 3, a provision w applies to all estates whether revenue-ing or revenue-free, and the terms of are quite absolute. No ground is sh on which we should or could overrid absolute terms of that law, because rev has been assessed on the plaintiff. Pl has all along been entitled to take the ryots the rent payable by all ryots ac ing to the old custom. Defendant paid and does pay that rent. The difference is that, while hitherto plaintiff kept it all to himself, he is now bound pass part of it on to Government.

The appeal is dismissed with costs.

The 25th April 1865.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Appeal—Rival Decree-holders.

Case No. 113 of 1865.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 14th December 1864, reversing an order passed by the Principal Sudder Ameen of that District, dated the 9th September 1864.

Nawab Hajee Mahomed Khan Kuzulbash (Decree-holder and Objector), *Appellant,*

versus

Thakoor Singh *alias* Bheem Singh (Collusive Decree-holder), *Respondent.*

Baboos Juggadanund Mookerjee and *Khetternath Bose* for Appellant.

Mr. R. E. Twidale for Respondent.

In a question between rival decree-holders an appeal will not lie.

Note by Deputy Registrar.—THIS is an appeal against an order passed by the Judge of the 24-Pergunnahs.

It would appear that one Bheem Singh, in execution of a decree, dated the 25th of August 1863, attached, *on the 8th of February 1864*, certain property belonging to the judgment-debtor, Alla Nowazee Begum, which had already been attached, on the 10th of April 1860, by Nawab Hajee Mahomed Khan Kuzulbash, pending the result of a suit instituted by him against the said judgment-debtor, in which a decree was obtained in his favor, bearing an earlier date than that of Bheem Singh.

The Principal Sudder Ameen released the attachment under Bheem Singh's decree, under Section 246, Act VIII. of 1859.

The Judge in appeal reversed the Principal Sudder Ameen's order, and directed that officer to follow the procedure laid down in Section 27, Act VIII. of 1859.

Nawab Hajee Mahomed Khan Kuzulbash appeals against the above order of the Judge.

The dispute is now between the two decree-holders, and not between the two original parties to the suit. The case, therefore, does not fall under Section 11, Act XXIII. of 1861, which provides that "questions arising between *the parties to the suit in which the decree was passed, and relating to the execution of the decree,* shall be determined by order of the Court executing the decree, *and not by a separate suit,* and *the order passed by the Court shall be open to appeal.*"

Section 246 of Act VIII. of 1859, however, expressly provides that an order, such as that passed by the Principal Sudder Ameen, is "*not subject to appeal;* but the party against whom the order is given shall be at liberty to bring a suit to establish his right within one year from the date of the order."

There being good reason to doubt whether the Lower Appellate Court had any jurisdiction in the case, and, consequently, whether an appeal from such an order would lie to this Court, I beg to refer the question for the orders of the Lowazima Bench.

The Court may, under Section 35, Act XXIII. of 1861, "call for the record of any case decided on appeal by a subordinate Court, in which no further appeal shall lie, when such Court exercises a jurisdiction not vested in it by law," and may set aside such an order. But, I apprehend, the Court can only be induced to take action on the motion of the party, and not on an appeal.

Mr. Justice Loch.— It is a matter of little consequence how the irregularity is brought to the notice of this Court, whether by motion or by a petition of appeal. The Court may act on either application. Send for the record, and submit it to the Miscellaneous Bench for orders, and direct the Lower Court to suspend proceedings till it receives further instructions from this Court.

Order.—In this case we have heard both parties, and are clearly of opinion that no appeal lay to the Judge. It is true that Hajee Mahomed first appeared in the Principal Sudder Ameen's Court as an intervenor in a case in which Bheem Singh was plaintiff, and Nowazee Begum was defendant. But, substantially, the decision of the Principal Sudder Ameen had reference to the rival claims of Hajee Mahomed and Bheem Singh. To all intents and purposes they were rival decree-holders, disputing about priority of

claim to attached property of a debtor. As such, their case falls within the scope of the Full Bench decision, quoted at page 527 of Marshall's Reports, which rules that, in a question between rival decree-holders, an appeal will not lie.

Looking at the case in this view, which is the substantial and correct and just view to take, the question appealed to the Judge was a question between rival claimants, and the Judge, under the decision quoted, should have refrained from entering on a consideration of the same.

We reverse the Judge's decision with costs, and restore that of the first Court.

The 25th April 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Execution of decree for immoveable property —Possession (under Sections 223 and 224 of Act VIII. of 1859).

Case No. 84 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Moorshedabad, dated the 28th November 1864, affirming an order passed by the Principal Sudder Ameen of that District, dated the 21st July 1864.

Messrs. J. Robson & Co. (Decree-holders), *Appellants,*

versus

Mr. Maseyk, Manager on behalf of Mr. C. S. Hogg, Administrator to the Estate of Mr. D. Andrew, deceased (Judgment-debtor), *Respondent.*

Mr. Montriou and *Baboo Baneenath Bose* for Appellants.

Mr. R. T. Allan and *Baboo Baneemadhub Banerjee* for Respondent.

A person, who has obtained symbolical possession under Section 224 of Act VIII. of 1859, may subsequently ask for actual possession under Section 223, if the terms of his decree warrant such possession being given.

THE petitioner applied for possession in execution of his decree, and obtained symbolical possession under Section 224, Act VIII. of 1859. Finding that certain part of the property was in the actual possession of the judgment-debtor, he applied to the Principal Sudder Ameen to get actual possession under Section 223. Both the Lower Courts have rejected his application on the ground that he has already been put into possession, and given a receipt to that effect.

We think the order passed by the Lower Courts is erroneous. There is nothing in the law to prevent a person who has obtained possession under Section 224 from asking subsequently for possession under Section 223 of the land, or such portion of it as he may find to be in the actual possession of the defendant, provided the terms of his decree warrant such possession being given. We therefore reverse the order of the Lower Courts, and direct the Judge to look to the decree, and, if the terms of that decree warrant actual possession being given, there is nothing in the law to prevent it.

The 26th April 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Limitation—Keeping decree alive.

Cases Nos. 55 and 56 of 1865.

Miscellaneous Appeals from an order passed by the Judge of the 24-Pergunnahs, dated the 28th December 1864, affirming an order passed by the Sudder Ameen of that District, dated the 29th September 1864.

Raj Bullub Bunge (Judgment-debtor), *Appellant,*

versus

Tarranath Roy (Decree-holder), *Respondent.*

Baboo Opendur Chunder Bose for Appellant.

Baboo Bhowanichurn Dutt for Respondent.

Something more than the mere presentation of a petition on the part of a decree-holder for execution is necessary to keep a decree alive.

IN this case the Judge has held that the presentation of a petition on the part of a decree-holder for execution is sufficient to keep the decree alive. This Court has held, in several instances, that something more than the filing of a petition is necessary to be done by a decree-holder seeking to avoid the effect of the Law of Limitation. But it is urged by the respondent that, if the Court overrule the Judge on this point, still the decree-holder is entitled to execute his decree, for it was not in existence when Act XIV. of 1859 was passed. The decree was passed on 5th June 1860. The operation of Act XIV. of 1859 was suspended till the 1st

anuary 1862, by Act XI. of 1861. The ecree was not in existence when Act XIV. f 1859 was passed, but it was so when at law came into operation. The decree-older is, therefore, entitled to the benefit of e time granted by Section 21, and as he as filed his application within three years om the time when the law came into opera-on, he is entitled to execute his decree. Ve confirm the order passed by the Judge, ut not for the reason assigned by him, hich we think to be erroneous. The ap-eal No. 55 is dismissed with costs, and o. 56 without costs.

The 24th April 1865.

Present:

he Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

ractice of High Court—Review of Judgment or Order (Second applications for).

pplication for review of an order rejecting an Application for a second Review of Judgment, passed by Mr. Justice Bayley, dated the 27th February 1865.

Kanto Lall Singh, *Petitioner.*

versus

Brojo Lall Singh, *Opposite Party.*

An order, rejecting an application for review of a dgment or order passed by the Court, is final. Ap-ications for re-consideration of such orders should t be received in the Office, but the applicants should referred to the Bench receiving motions.

Note by the Deputy Registrar.—ACCORD-G to paragraph 7 of the Review Rules, dated e 6th of May 1863, passed by the whole ourt, an order rejecting an application for view is final. The law too, Section 378 Act VIII. of 1859, declares that such an der is final.

The Court (Mr. Justice Steer and Mr. stice Jackson), however, have, on the 8th December 1864, in Case No. 1395 of 1864, keerooddeen and another *versus* Kalachand rdar and others (page 287 of the Weekly eporter, Volume I.), held that a *second* plication for review of judgment can be mitted, although the *first* may have been jected as founded on insufficient grounds.

This ruling does not seem to me exactly apply to the case in hand, which is an plication for review of an order rejecting application for review, and not a *second* plication for review of a judgment.

I, therefore, beg the orders of the Court on the following points :—

1st.—Can the Office of itself, that is, without the orders of the Court obtained by way of a motion, receive *second* and other applications *ad infinitum* for the review of a judgment?

2nd.—Are applications for reviews of orders rejecting applications for reviews admissible, and can the Office of itself receive such applications?

Under the old practice, it was not unusual to receive a third and even a fourth application for review; but, since the passing of the Review Rules of the 6th of May 1863, there has not been, to my knowledge, a *second* application for review, nor an application for review of an order rejecting a review.

Order.—When an application for review is rejected, that order is final, whether the application relate to a judgment or order. No *second* application for the review of a *judgment* or *order* should be received in the Office; but the party should be referred to the Bench receiving motions. The law, Section 378 of Act VIII. of 1859, is perfectly distinct on this point, that the order rejecting an application for review of a judgment passed by the Court is final. It is equally so in regard to an order.

The 26th April 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Collection of debts of deceased persons—Grant of Certificate to Husband in preference to Mother—Landed property in possession of Mother.

Case No. 19 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 14th December 1864.

Mohun Soondur Koonwur, *Appellant,*

versus

Ramanoogro Narain, *Respondent.*

Baboos Kishensuca Mookerjee, Mohendrolall Shome, and *Kaleeprosunno Dutt* for Appellant.

Baboos Kishenkishore Ghose, Sreenath Doss, Moheshchunder Chowdhry, Unnoda Pershad Banerjee, and *Dwarkanath Mitter* for Respondent.

A mother is not entitled to a certificate under Act XXVII. of 1860 to collect debts due to her deceased daughter in preference

to the husband of the deceased. Such certificate, however, will not authorize the husband's interference with the mother's possession of the landed property which she claim as her own.

THIS is a dispute regarding a certificate under Act XXVII. of 1860. From the evidence we find that the landed property, which is alleged to have belonged to the late Geer Koomar, is in the possession of her mother, the appellant before the Court. We do not think that the appellant is entitled to a certificate in preference to the husband of the deceased. At the same time we consider that the appellant, being in possession of the landed property, cannot be ousted from that property or prevented from collecting the rents thereof by the husband of the deceased on the strength of the certificate which he receives to collect outstanding debts due to the deceased. The husband of the deceased is entitled to receive a certificate to enable him to collect debts due to the deceased, but that certificate will not authorize his interfering with the possession of the appellant in the landed property which she claims as her own. With this reservation we confirm the order of the Judge. The parties will pay their own costs.

The 2nd May 1865.

Present:

The Hon'ble *Sir* Barnes Peacock, *Kt.*, *Chief Justice*, and Shumbhoonath Pundit, *Judge*.

Mortgaged property.

Case No. 381 of 1864.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Behar, dated the 21st May 1864.

Boodhoo Singh and others (Objectors), *Appellants*,

versus

Kishen Chunder Ghose and others (Decree-holders), *Respondents*.

Baboo Unnodapershad Banerjee for Appellants.

Baboos Kishenkishore Ghose and *Baneemadhub Banerjee* for Respondents.

Where a mortgage is a charge on the whole of an estate, before the mortgage can be removed from any part of the estate, the whole mortgage-debt must be paid off.

WE think it clear that the decree of the Lower Court must be reversed. The decree showed that the mortgage was a charge upon the whole estate. Consequently, nobody was entitled to take away a moiety of the estate from the mortgagee without paying the whole amount due upon the mortgage. Before the mortgage could be removed from any part of the estate, the whole mortgage-debt must be paid off.

The order of the Principal Sudder Ameen, allowing possession of the moiety to the plaintiffs on their depositing only half of the mortgage-money, must be reversed. Each party to bear his own costs.

The 2nd May 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges*.

Benamee sale in execution of decree—Right of re-sale.

Case No. 91 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Moorshedabad, dated the 14th February 1865.

The Nawab Nazim of Bengal (representative of the Judgment-debtor), *Appellant*,

versus

Muzhur Ali *alias* Sat Cowree Mean (purchaser of decree), *Respondent*.

Baboos Kishenkishore Ghose, *Onoocoolchunder Mookerjee*, and *Obhoychurn Bose* for Appellant.

Mr. R. T. Allan and *Baboos Sreenath Dass* and *Gopal Lall Mitter* for Respondent.

A *benamee* or collusive sale of property in execution of a decree will not save it from re-sale in satisfaction of the decree.

A PRELIMINARY objection is taken to this appeal, that the Nawab Nazim comes before the Court in the character of an intervenor, and, as such, cannot be heard.

The position of the petitioner is peculiar, and, under the circumstances, we think his appeal is admissible. He is made the representative of the deceased debtor, and as such liable for the debt, and in that capacity is entitled to appeal; but he says the property attached and sought to be made liable for the decree came into his hands from a source other than from the debtor. This circumstance, even if true, should not, we think, prevent us from receiving his appeal, the property having been held to be the property of the deceased debtor, and liable to sale.

For the petitioner, it is urged that the property in question did belong to the judg-

ment-debtor, and was sold in execution of a decree and purchased by Ameeroonissa, and that he succeeded to it as her heir, and therefore it cannot be again sold in satisfaction of the decree of the judgment-creditor. The petitioner also produces a proceeding of the High Court, dated 2nd August 1862, by which the property was released when previously attached by the present decree-holder in execution of this decree, as avowedly not being the property of the debtor. After this order was passed, the decree-holder again attached it, and the petitioner then disclosed what appears to have been unknown to the Court when it passed the order of August 1862, that the property did originally belong to the judgment-debtor, and was sold in execution of a decree against him, and was purchased by Ameeroonissa. This state of facts now disclosed by the petitioner should be disposed of by the Judge. He seems to think that the petitioner has caused some *benamee* sale of the property to be made; but the statement in his petition is perfectly distinct and apparently honest, and he should be required to give proof of it. If the sale under which Ameeroonissa purchased be a *bonâ fide* sale, the decree-holder cannot sell the property; if it be collusive, the property will be liable to sale notwithstanding the Court's order of August 1862, which was passed under what appears to have been an ignorance of the facts now brought to light. We remand the case for disposal with reference to the above remarks.

The 2nd May 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Appeal—Respondent—Remand.

Case No. 115 of 1865.

Miscellaneous Appeal from an order passed by the Additional Principal Sudder Ameen of Burdwan, dated the 17th December 1864.

Radha Kishore Bose and another (Judgment-debtors), *Appellants,*

versus

Maharajah Mahtab Chand Bahadoor (Decree-holder), *Respondent.*

Baboos Banee Madhub Banerjee and *Luckhee Churn Bose* for Appellants.

Baboo Juggadanund Mookerjee for Respondent.

A respondent must be held to the grounds on which he rested his case when the appeal was before the Court prior to the case being remanded to enable him to prove a particular allegation.

THIS case was sent back to give the respondent an opportunity to prove a particular allegation which he raised at the time of hearing the appeal, *viz.*, that the acts said to have been done in 1861 and 1862 in furtherance of the execution of the decree were collusive. The Lower Court has found that the evidence adduced by him is unworthy of credit, and has rejected it. He now comes up before this Court on another plea, that in 1861 and 1862 he pleaded limitation, and no order was passed till 1864, when the Lower Court held that limitation did apply.

We think that the respondent must be held to the grounds on which he rested his case when the appeal was before us. The evidence he now produces was at the time on the record, but he abstained from making any use of it, and treated it as not furthering his case. Now that the plea he then pressed before the Courts has failed, he goes back to other evidence, and raises a fresh objection. We think it unnecessary to go into the statements of the decree-holder to show that the Lower Court was wrong in considering that the proceedings taken by him in 1856 were insufficient to keep the decree alive, as that is not the point now before us. We reject this petition with costs.

The 2nd May 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Jurisdiction—Revival of decree of one Court struck off by another.

Case No. 117 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 16th December 1864.

Sreedhur Sursutty and others (Decree-holders), *Appellants,*

versus

Moharajah Bhoop Singh (Judgment-debtor), *Respondent.*

Baboo Mohesh Chunder Chowdhry for Appellants.

Baboo Onoocool Chunder Mookerjee and *Moonshee Ameer Ally* for Respondent.

A decree transmitted to, and struck off by, another Court than the Court where it was obtained, can only be sought to be revived in the latter Court.

BEFORE this appeal could be heard, the respondent took a preliminary objection to the order of the Judge of Patna as altogether without jurisdiction, which objection after hearing the appellant, we think legal and valid.

The decree sought to be executed was a decree of the Court of Tirhoot. A certificate was obtained from that Court towards the close of 1861, and forwarded to the Court of Patna in conformity with the provisions of the last portion of the chapter of the Civil Code for execution of decrees, Section 284 and following. In the said Court of Patna, the decree was struck off on the 28th of February 1862. It is now argued for the respondent that the decree should never have been revived, as it has been, by the Judge of Patna; but that execution should have been again sought for, and proceedings have been again taken in the Court of Tirhoot. Though the law makes no express provisions for cases of decrees transmitted to other Courts, when they are struck off, and when they are sought to be revived in such Courts, it is still sufficiently clear to us that the same procedure ought to be strictly followed over again. Were it otherwise, all sorts of irregularities and frauds might be committed. The decree might have been satisfied to the last anna in the Court where it was obtained; and it yet might be again revived, after being struck off, in the Court to which it had once been transmitted, by any vindictive, reckless, or unscrupulous creditor, for the mere purpose of annoyance and harassment. The Court of Patna, and any Court so situated, has not the whole record before it, and can have no means of knowing the exact position of the parties and the real state of the case.

In this view, holding that the revival in the Patna Court was illegal, and that such illegality is one of substance and not of mere form, we annul the Judge's proceedings altogether, and leave the decree-holder to apply to the Tirhoot Court, if he be so advised, for the revival of proceedings.

Appeal dismissed with costs.

The 9th May 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Hindoo Law—Inheritance—Adoption—Hindoo Widow—Certificate (under Act XXVII. of 1860).

Case No. 38 of 1865.

Miscellaneous Appeal from an order passed by Mr. A. Pigou, Judge of Hooghly, dated the 13th December 1864.

Sreemutty Deeno Moyee Dossee, *Appellant,*

versus

Doorga Pershad Mitter, *Respondent.*

Baboos Sreenath Doss and *Dwarkanath Mitter* for Appellant.

Baboo Mohendro Lal Shome for Respondent.

A had permission from her husband *B*, with the consent of his father *C*, to adopt three sons in succession. *B* died before *C*, and *C*, before his death, executed a will leaving his property to *A's* adopted son, and appointing *D* executor, and directing him to take possession of the property until the adopted son came of age, when he was to be proprietor of his entire estate. After *C's* death, *A* adopted *E*, who died before he came of age. HELD (1) that the property vested in *E* on his adoption, although he was a minor, *D* being merely a manager; (2) that, under the Hindoo Law, *A* was the legal representative of her adopted son *E*, and consequently entitled to a certificate under Act XXVII. of 1860 as his legal heir; and (3) that *A's* title to the property was not contingent on her adopting three sons in succession, as a Hindoo widow, having permission to adopt, cannot be compelled to act up to that permission.

DEENO MOYEE, the appellant before us, received permission from her husband, Jadub Chunder, with the consent of his father Rajmohun, to adopt three sons in succession. Jadub Chunder died before his father Rajmohun. Some time before his death, Rajmohun executed a will, by which he left his property to the adopted son of Deeno Moyee, and appointed Doorga Doss as executor, directing him to take possession of all his moveable and immoveable property till the adopted son came of age, when the son was to become the proprietor of his entire estate. Deeno Moyee adopted Sooruthnath after the death of Rajmohun, and Sooruthnath died in January 1864. Deeno Moyee has failed to adopt another son which she had permission to do, and now claims a certifi-

cate under Act XXVII. of 1860 as legal heir of her deceased adopted son. The Judge has held that, as the child never came of age, he never became vested of the property, and that consequently Deeno Moyee could have no claim to the property. This argument is urged before us in appeal, and it was also urged that Deeno Moyee could have no legal title to the property till she had carried out her husband's wish, *viz.*, that of adopting three sons in succession. Now, it is clear that a Hindoo widow, having permission to adopt, cannot be *compelled* to act up to that permission; and we think the Judge was wrong in supposing that the property did not vest in Sooruthnath when he was adopted. The management remained with Doorga Doss, but nothing more. The words on which the Judge lays stress merely signify that, on the adopted son attaining majority, all interference on the part of the executor in the property would cease; and that Deeno Moyee is the legal representative of her adopted son under the Hindoo Law, there can be no doubt; and, had there been room for any question on the matter, it is set at rest by the decision* of the High Court in its Original Jurisdiction produced before us to-day, in which the position of Deeno Moyee

* The 24th March 1865.

Present:

The Hon'ble *Sir* Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge*.

Sreemutty Deeno Moyee Dossee

versus

Tarrachurn Coondoo Chowdry and others.

We are of opinion that in this case the plaintiff is entitled to have the deed of mortgage set aside as regards the heirs, and so far as it affects the estate of Raj Mohun Roy. She is also entitled to restrain the defendants from proceeding to enforce the foreclosure, or taking any further proceedings against the heirs of Raj Mohun Roy, or his estate in that suit.

We are of opinion that, under the will of Raj Mohun Roy, Doorgapershad had no right to create this mortgage. Although Doorgapershad became the attorney or executor under the will of Raj Mohun Roy, he had not, according to the Hindoo Law, the same power over the estate of Raj Mohun, moveable and immoveable, which an executor would have over lease-hold estate according to English Law. We think that, according to Hindoo Law, an attorney or executor under a will has no greater power over immoveable estate than a manager, which, according to the decision of the Privy Council, in the case of Hunnooman Pershad Panday (reported in 6 Moore's Indian Appeal Cases, p. 393), is a limited and qualified power; and, further, we are of opinion that the general power of a manager under a will may be restricted by the will, and that the manager is bound to act according to the directions in the will. If, therefore, Doorgapershad had the power to mortgage for specific purposes, it would have been the duty of the lender to enquire into the circumstances under which the estate was about to be mortgaged; and whether the executor or attorney had authority under the will to effect such a mortgage. But independently of that view of the case, we are of opinion that, according to the true construction of Raj Mohun Roy's will, Doorgapershad had no power to mortgage the house in question.

The 6th item of the will says: "You shall spend in "the marriage of Sreemutty Bheenoomotee Dossee, my "grand-daughter, in the female line, Rs. 200, and on "those of my two grand-daughters, in the male line, "Rs. 1,400, and on my *shrad* Rs. 800."

It is perfectly clear that, under this, the manager or executor, or whatever he may be called, had no power whatever to spend upon those marriages a larger sum than the testator appointed for that purpose. But Doorgapershad says the family would have lost caste if he had not spent larger sums than those specified in the will. Surely, however, the testator was a better judge than he as to how much was to be spent out of the testator's estate on the marriages of his grand-daughters; and the testator limited the sums as specified in the 6th item.

The will continues thus in the 7th para.: "You shall "pay my debts and receive my demands agreeably to "my *khata* or ledger, and make the disbursements "specified in the above items" (referring to the paragraphs of the will in which the executor is authorized to make different disbursements, including those mentioned in the 6th item). "In doing which, should there "be a deficiency, or should my demands not have been "realized at the point of time at which any act may "be about to be performed, you shall, in that case, sell "my Calcutta property at a reasonable price, and per-"form such act and liquidate my debts. You shall pay "out of my estate the charges and expenses of the "suits which are now pending, and which may here-"after be instituted, in respect of my property, and the "recovery of the moneys due to me; and after making "the disbursements specifically mentioned in the above "items, if there be a surplus, you shall purchase Com-"pany's Papers with the same, and keep it in your "*tahvil*; and when my son's adopted son shall have "attained the age of majority, he shall become the "*malik* of my entire estate to whom you shall account "for and make over the whole of my moveable and im-"moveable properties, and who, being constituted the "*sebatee* or superintendent of services of the duties, "shall perform and carry on the same."

It appears clear from the evidence of Doorgapershad that he borrowed the money, which is received by this mortgage, at the time of the second daughter's marriage, and that he borrowed it for the purpose of paying for her marriage, possibly also for the purpose of paying off debts incurred for the marriage of the previous grand-daughter, but for nothing else. The defendant's own manager deposes that, when Doorgapershad borrowed the money, he said it was required for the purpose of the second marriage. It is clear, therefore, that, if the defendant Doorgapershad had the power to mortgage at all, he could not do so for a larger sum than the Rs. 1,400, which the testator said was to be spent on the two marriages: and before the mortgage would have been good to the extent of Rs. 1,400, the mortgagee was bound to have enquired whether the former daughter's marriage expenses remained unpaid. It appears that the mortgagees were told that the money was wanted for the second marriage, but that they made no enquiries on the subject. In the mortgage-deed it is recited that Doorgapershad borrowed the money for the purpose of the management of the estate. But there is nothing, except the deed, to show that he did borrow this money for general purposes of management. The purpose for which it was borrowed is proved by a witness who was, at the date of the mortgage, the manager of one of the mortgagees themselves, and he swears that Doorgapershad said the money was required for the second marriage. It appears to us that he could not, for the purpose of the second grand-daughter's marriage, expend more than Rs. 700, or expend on the two weddings

is fully recognized. We therefore reverse the decision of the Judge, and direct that the certificate sought for be given to appellant. The appeal is decreed with costs.

more than Rs. 1,400 as limited in the will. The mortgagees, therefore, having distinct notice that the money was required for the marriages, were not justified in giving so much as Rs. 3,000; and certainly Doorgapershad, who at the most could spend only Rs. 1,400 on that account, had no power to borrow Rs. 3,000, and pay a large interest on that amount. But it is unnecessary to go further into this point, because we think that it was the intention of the testator, as expressed by his will, that, if the income of this estate were not sufficient to meet the demands on it, the Calcutta property was to be sold. A direction to sell a house, and to invest the surplus in Government securities, is a very different thing from a direction to borrow a large sum of money at 15 per cent. or some other high rate of interest. The case of Holdenby *versus* Spofforth (1 Beavan 390) shows that a trust to "make sale or dispose of" the testator's real estates does not authorize a mortgage, there appearing an intention on the part of the testator that the whole estate should be converted. And in the present case we think that the clear intention of the testator was that, if it should become necessary to raise money for the purposes of his estate, the house in Calcutta should be sold, and the surplus proceeds, if any, invested in Government securities. When a testator says that the proceeds of a sale are to be applied in a particular manner, he practically points out very distinctly that the house is not to be mortgaged, more especially that it is not to be mortgaged at a high interest, which must almost necessarily be injurious to the estate. Under these circumstances we think that Doorgapershad, under the will, had no power to mortgage; and that, if it was necessary to raise money for the purpose of paying any disbursements, it was his duty to sell the house, and invest the surplus proceeds in Government securities.

Then it is said that plaintiff seeks to set aside the mortgage on the ground of fraud, and that the Court cannot grant relief unless a case of fraud is made out. But we do not think that, under the new Procedure, it was ever intended to bind the parties so strictly to the pleadings as they are bound in an equity suit in England. What was intended under the new Procedure was that justice should be done between man and man. Suppose an ignorant person in the mofussil sued to set aside a deed on the ground that it was fraudulent, and asked the Court to give him such relief as he might be entitled to, is he to be shut out from all relief because he alleged fraud? That is just what the plaintiff in the present case has done; for, though she says that the defendants have acted fraudulently, she also says that Doorgapershad had no right to sell or mortgage the estate. If the Court thinks that defendant has a right to sell and not to mortgage, it is not because the plaintiff says that the defendant has no right to sell or mortgage, and because the plaintiff charges fraud, that she is to have her suit dismissed altogether. We have come to the conclusion that Doorgapershad had a right to sell, but that he had no right to mortgage; and that, even if he had a right to borrow on mortgage from these mortgagees to the extent of Rs. 700 or Rs. 1,400, he had no right to do so to the extent of Rs. 3,000. We think, therefore, that we are bound, in justice and equity, to give the plaintiff the relief she is entitled to; the more so when we find that one of the issues fixed at the original hearing was whether Doorgapershad had power to mortgage.

It was contended that the plaintiff had no *locus standi*, because she was not the heiress of Raj Mohun Roy. That point was, however, almost abandoned, but if it was not abandoned, we have no doubt that the plaintiff had a *locus standi*, as decided by the learned Judge. Plaintiff was the widow of Jadub Chunder, who died in his father Raj Mohun's lifetime. Raj Mohun Roy, the father, in his will, recites that his son had given permission to his wife, with his (Raj Mohun's) consent, to adopt three sons in succession, *i.e.*, on the death of the first to adopt a second, and on the death of the second to adopt a third; and Raj Mohun goes on in his will to direct Doorgapershad to see that, in pursuance of this direction, she shall adopt a son. She did adopt a son, Surrutnath, who has since died; and she now sues as his heiress and representative. It is contended that, if, on the death of Surrutnath, the first adopted son, the plaintiff had adopted a second son, she would not have been the heiress of her first adopted son, inasmuch as the second adopted son would have been his heir. This may be true, but it does not affect her rights in this suit since, as a matter of fact, she has made no second adoption. Although she may have committed a wrong in not adopting a second son under the power given by her husband, that does not prevent her from being the heiress of Surrutnath, the adopted son. We may add that, under the circumstances, we are not sure that, if she had adopted a second son, that second son would have been the heir of Raj Mohun Roy, for it is clear that Raj Mohun Roy never gave his consent to the widow's adopting a second son in the event of the death of the first adopted son. As it is, however, the widow, not having adopted a second son, has become the heiress-at-law of Surrutnath, and as such is entitled to succeed to Raj Mohun Roy's estate.

The decree of the learned Judge is reversed, and the mortgage-deed is declared void as against the heirs of Raj Mohun, and so far as it affects Raj Mohun's estate. The defendants must pay the costs of the suit in the Court of first instance, to be taxed on scale No. 2, and an injunction will issue to restrain the defendant's mortgagees from proceeding to final foreclosure under the decree which they have obtained, or from taking any further proceedings in that suit against the heirs of Raj Mohun, or his estate.

The parties will respectively bear their own costs of this appeal.

The 9th May 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Objectors—No appeal.

Case No. 446 of 1864.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Bhaugulpore, dated the 2nd July 1864.

Gossain Jhunnu Pooree and another (Objectors), *Appellants,*

versus.

Anund Moyee Dossee (Decree-holder), *Respondent.*

Baboos Debendro Narain Bose and *Kallee Kishen Sein* for Appellants.

Baboo Kishen Kishore Ghose for Respondent.

No appeal lies to an objector. Only the actual parties to the suit can be heard in appeal.

THE appellant is avowedly an objector, and not a party to the original suit. He does not show us that he ever defended or appeared in the case for Debee Pooree. In this position he is not entitled to appeal, as it has been repeatedly ruled that only the actual parties to the suit can be heard in appeal.

We dismiss this appeal with costs.

The 15th May 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Permission to carry on suit or execute decree for deceased person without certificate under Act XXVII. of 1860.

Case No. 149 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Moorshedabad, dated the 22nd February 1865.

Syed Ekram Hossein (Decree-holder), *Appellant,*

versus

Rajah Kirtee Chunder Bahadoor (Judgment-debtor), *Respondent.*

Mr. J. Baptist for Appellant.

Baboo Greeja Sunker Mojoomdar for Respondent.

A Court may, on application, if satisfied, allow a party to represent a deceased person in carrying on a suit or executing a decree, without his obtaining a certificate under Act XXVII. of 1860. Such permission will be no warrant to such party to collect debts as if he held a certificate under that Act.

IN a case like the present, we see no ground for refusing the petitioner permission to represent his daughter and execute the decree. A certificate under Act XXVII. of 1860 is not required to be obtained before a party is allowed to represent another who has deceased in carrying on a suit or executing a decree. It is enough for the Court, to whom a party makes application to represent a deceased person, to take evidence that his statement is true, and, if satisfied that he is the representative, to insert his name as such for the purposes of the suit. Of course, such permission would be limited to the particular case, and would not be a warrant to such party to collect debts as if he held a certificate under the Act. We reverse the order of the Lower Court with costs, and direct the Judge to enter the name of the appellant as representative of the deceased, if he have proved his title.

The 22nd May 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Decree—Mesne-profits.

Case No. 126 of 1865.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Tirhoot, dated the 31st December 1864.

Jugdeb Narain Singh and others (Decree-holders), *Appellants,*

versus

The Court of Wards, on behalf of the Rajah of Durbhanga (Objector), *Respondent.*

Baboo Romesh Chunder Mitter for Appellants.

Baboo Kishen Kishore Ghose for Respondent.

In execution no new directions (*e. g.*, an order for mesne-profits) can be imported into a decree.

WE have heard the pleader for the appellant; but we quite concur in the conclusion

arrived at by the Principal Sudder Ameen, that the Courts cannot, in execution, import new directions into any decree, or do any thing except to give effect to the explicit provisions which the decree contains. Now, the decree in this case contains no order for mesne-profits, nor any words or directions which we can construe as giving mesne-profits. The appellant ought either to have procured the insertion into the decree of an order for mesne-profits at the time of judgment, or he ought to have applied for a review. But we cannot assist him in execution.

Appeal dismissed with costs.

The 22nd May 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Interest—Attachment of decree.

Case No. 135 of 1865.

Miscellaneous Appeal from an order passed by Mr. O. Toogood, Judge of Beerbhoom, dated the 29th December 1864.

Wooma Pershad Shome and others (Judgment-debtors), *Appellants,*

versus

The Collector of Beerbhoom, for Ramrunjun Chuckerbutty, minor, under the guardianship of the Court of Wards (Decree-holder), *Respondent.*

Baboo Bykuntnath Paul for Appellants.

Baboo Kishen Kishore Ghose for Respondent.

The attachment of a decree does not deprive the decree-holder of the interest to which he has been declared entitled.

THE petitioner, on 8th August 1856, obtained a decree against the party now represented by the Collector on the part of the Court of Wards for Rupees 1,133-14, with interest from date of decree.

The party now represented by the Collector brought a suit for mesne-profits against the petitioner in 1857, and ultimately obtained a decree for Rupees 905, with interest from date of suit on 26th June 1862.

this second suit was instituted, the applied for the attachment of the petitioner's decree under Regulation II. of 1806; and that attachment has continued till the present time.

On the 6th January 1863, the Collector sued out execution; and from the order then passed, an appeal was preferred by the present petitioner to the High Court, who, on the 28th July 1864, directed the Judge to ascertain the following points: *1st,* the amount still due to the Collector under his decree of June 1862—whether a certain party, against whom execution was sought, had not been exempted from the operation of the decree, and whether the appellant was in a position to claim a set-off under the decree he alleged that he held.

The Judge, in his proceeding of 29th December 1864, held that the sum due to the Collector was Rupees 534-6-9; that Khanum Kooree had been released from the decree; and that the appellant had failed to produce any proof in regard to the third point.

From this order, the petitioner appeals to the Court, pointing out that the Collector admits that the existence of the decree which the petitioner held, and the only question to be determined, was whether, as the Collector had attached that decree, the petitioner was not entitled to have interest thereon till the present application for execution of his decree was made by the Collector. We think the petitioner is entitled to interest up to the date when the Collector applied for execution; and we think the account should be settled as follows: The Collector is entitled to Rupees 905, with interest from date of suit. The account must be made up to the 6th January 1863, on which date the Collector applied for execution. The petitioner is entitled to recover Rupees 1,133-11 under his decree, with interest from date of decree. The fact of his decree having been attached will not deprive him of the interest to which he is declared entitled, but will make his claim to interest stronger, inasmuch as he was unable to take steps to execute the decree so long as it remained under attachment. His account, therefore, must be made up also to the 6th January, and a set-off allowed. If it be found that a balance remains payable to the Collector, he will recover it with interest. if the balance is found to be due to the petitioner, he will recover with interest from that date. We reverse the order of the Judge with costs, and remand the case for the account to be adjusted in the manner above indicated.

The 30th May 1865.

Present :

The Hon'ble *Sir* Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Sale in execution of decree (Fresh proclamation in case of indefinite postponement)—Evidence (Service of notice of Appeal, &c.)—Chowkeedar's receipts and Nazir's reports (Proof of).

Case No. 49 of 1865.

Miscellaneous Appeal from' an order passed by Mr. J. Reilly, Principal Sudder Ameen of East Burdwan, dated the 29th September 1864.

Okhoy Chunder Dutt (one of the Judgment-debtors), *Appellant*,

versus

Messrs. Erskine and Co. (Decree-holders), *Respondents.*

Baboos Ashootosh Dhur and *Doorga Doss Dutt* for Appellant.

Baboos Banee Madhub Banerjee and *Taruck Nath Sein* for Respondents.

When a sale in execution of a decree is postponed indefinitely, the issue of a fresh proclamation under Section 249, Act VIII. of 1859, giving notice of the time and place of sale, is necessary.

Chowkeedar's receipts and Nazir's reports are not evidence *per se* of the service of the notice of appeal and the like, but must be proved as any other documentary evidence.

(Seton-Karr, J., *dissentiente*, on the ground that the defendant, by his conduct, had put himself out of Court.

Mr. Justice Loch.—THE petitioner appeals from the order of the Principal Sudder Ameen rejecting his objections to the sale of his property in execution of a decree held by Messrs. Erskine and Co. He alleges that proclamation of sale was not duly made, and that, in consequence, he has suffered material injury; his estate, which was worth three lakhs of rupees, having been sold for about Rupees 16,000; that the Principal Sudder Ameen, instead of entertaining his objection, rejected it without enquiry, on the ground that his predecessor had already rejected it, and the petitioner had not appealed from that order.

It appears that, on 3rd September 1864, the petitioner presented a petition to the former Principal Sudder Ameen, stating that the proclamation for the sale of his property fixed for the 19th idem had not been legally issued, and praying that the sale might be postponed till the result of his case, then pending before the High Court, were known. This petition was rejected, and the sale took place on the day fixed. The petitioner then put in a further petition on 29th September, in which he again raised objection to the legality of the sale, on the ground that the proclamation had not been properly issued. This was rejected by the present Principal Sudder Ameen, who gave the petitioner no opportunity of proving his allegations, assigning, among other reasons, that the objection as to the proclamation had already been disposed of by his predecessor.

This is the only substantial ground of objection that the petitioner has to rest upon. His other objections are frivolous. With regard to the above objection it is urged by the decree-holder that the plaintiff is not in a position to ask the Court to grant him any indulgence, as the sale has been postponed eleven times at the request of the judgment-debtor, who has promised to pay up, but has invariably failed to do so; that, after a first proclamation is made, the law does not require a further proclamation to be issued in the event of postponement of sale; and that the present sale took place in consequence of the express orders of the High Court of 4th May 1864.

I quite agree with the pleader for the decree-holder, that the judgment-debtor is entitled to no indulgence. He has acted most dishonestly towards his creditor, continually putting him off, and gaining time by bare promises; and were it satisfactorily shown to me that the issue of a fresh proclamation of sale is not necessary when such sale is postponed indefinitely, I should not hesitate to reject this appeal. But, though the law does not expressly say that, where the sale of immoveable property in execution of a decree is postponed, a fresh proclamation must be issued before the sale can take place, yet it is evident, from the wording of Section 249, that such must be the case; for the law directs that, in the event of intended sale by public action, a proclamation shall be issued at certain places, and with certain formalities; and enjoins, among other things, that the proclamation shall specify the *time and place* of sale. Now, it is evident that, if a sale be fixed for the 1st of January, and, for some reason it be postponed, and no sale take place till the 20th March following, it is needful, in compliance at least with the spirit, if not with the wording of the law, and for the information of intending purchasers, to issue a fresh proclamation, fixing the *time and place* of sale;

and if this be not done, material injury to the judgment-debtor is likely to ensue. The old proclamation becomes inoperative, if the time fixed for the sale have passed by, unless the time have been postponed by order from day-to-day, or to some other particular date. I think, therefore, that the law requires, in cases of indefinite postponement of sale, the issue of a fresh proclamation fixing a fresh date for the sale to take place.

Assuming that this is a correct view of the law, I turn to the petitioner's case: He says, no proclamation was issued as required by law, and he asks the Court to send for and examine the witnesses whose names are appended to the receipt, stating that it was duly issued. The Principal Sudder Ameen refused to make any investigation beyond looking at the Nazir's returns. He has not given the petitioner an opportunity of proving his allegation. It may be altogether untrue, and merely a further trick to gain time. Still it is an objection to the regularity in publishing the sale, an objection which ought, by Section 256 of Act VIII. of 1859, to be investigated, and I therefore think the petitioner should have been allowed to call witnesses to prove the allegation. The rejection of the petition, without enquiry by the former Principal Sudder Ameen previous to the sale, is no sufficient reason for not investigating the objection when brought up after the sale, and the Nazir's returns, unless duly attested, are no evidence. The only use of these returns is to enable a Court executing a decree to proceed to sale. But, if the proceedings in regard to that sale are disputed, and reliance is placed on the Nazir's returns, they must be proved on oath as any other documentary evidence is proved. I would return the case to the Principal Sudder Ameen, and direct him to investigate this one objection.

Mr. Justice Seton-Karr.—After ample consideration, I feel unable to adopt the view taken by my colleague with regard to further delay and enquiry.

Assuming that my colleague's view of the law laid down in Section 249 is correct, and that a second proclamation *was* necessary after the first postponement of the sale, I am yet of opinion that the appellant is not in a position to derive any benefit from any one of his objections.

The sale of the property has now been postponed no less than eleven times on one pretext or another, and we may now safely assume that, though the objections of the debtor may have been, for some cause, repeatedly admitted by the Court, the real object of the debtor has been to gain time, and to hold his creditors at arm's length, and that he has certainly been successful hitherto in this object.

The Nazir's several reports in this case are all apparently formal and regular, and I would assume that every thing had been solemnly and properly done. The appellant, who had impugned the sale on the ground that the property was really worth three lakhs of rupees now admits in appeal before us that the estimate is greatly exaggerated, and that the value would be about 75,000 rupees. Even admitting that there had been any irregularity in the conduct of the sale, which I do not, the appellant does not appear to me in a position to prove that he has sustained any substantial injury by the same, or even to claim the protection of the Court in any way.

The intention of selling the property must have been well and widely known. No less than fourteen decree-holders had claims on the estate. The objections as to the defective issue or notice of the proclamation, I am disposed to regard as frivolous and untenable *on the face of them*, and as not worthy of any attention or enquiry on the part of the Court.

To rule otherwise, to direct that on an objection put forward at the eleventh hour of the twelfth series of objections by a debtor who has baffled his creditors so pertinaciously, and who is not shown to have paid up any portion of his debt, would be, it seems to me, to make our Court minister to the fraud and injustice attempted by thoroughly unscrupulous debtors, who are hopelessly involved and who have no intention of satisfying their creditors.

On the ground, then, that the appellant has put himself in such a position that he ought not to be allowed to claim the intervention of the Court, and that there is no ground to think that he could ever prove that he has sustained any substantial injury, which he would have to do even if he could make out that there had been a material irregularity, I would reject this application with costs, and would not grant the remand asked for.

The case must go to a third Judge.

The Chief Justice.—This is a miscellaneous appeal upon which the two learned Judges who heard it differed in opinion, and the case has been referred for the opinion of a third Judge.

One point has been made, namely, whether the two learned Judges differed upon a poi

of fact, or upon a point of law. If they differed upon a point of fact, it is said that the decision of the Judge who concurred in opinion with the Lower Court was final. But, if they differed upon a point of law, the case was properly referred for the decision of a third Judge. The point on which Mr. Justice Loch gave his opinion was: *first*, that, under Section 249 of the Procedure Code, it was necessary, in the event of a sale being postponed, to issue a fresh proclamation, giving notice of the day on which the sale would take place.

Mr. Justice Seton-Karr does not appear to have differed upon that point. He says: "After ample consideration, I feel unable to "adopt the view taken by my colleague with "regard to further delay and enquiry. As-"suming that my colleague's view of the "law, laid down in Section 249, is correct, "and that a second proclamation was neces-"sary after the first postponement of the "sale, I am yet of opinion that the appellant "is not in a position to derive any benefit "from any one of his objections."

Now, the question is, whether, in point of law, the appellant was precluded by his former conduct from taking this objection. It appears to me that Mr. Justice Loch was perfectly correct in his construction of Section 249, that where a sale is postponed indefinitely, a new proclamation giving notice of the day on which the sale will take place is necessary. It is exceedingly important that, when an auction sale is to take place in execution of a decree, a proclamation should be made, giving notice of the day on which the sale is to take place, so that intending purchasers may go and bid for the articles put up for sale, and that Act VIII. of 1859 is express on the point. Section 249 says: "In all cases of intended sale by public "auction, whether of moveable or immove-"able property, in execution of a decree, a "proclamation of the intended sale, *specify-"ing the time and place* of sale, the proper-"ty to be sold, the revenue assessed upon "the estate when the property to be sold is "an estate or a part of an estate paying "revenue to Government, and the amount "for the recovery of which the sale is order-"ed, together with any other particulars "that the Court may think necessary, shall "be made in the current language of the "district *** Such proclamation shall be "made on the spot where the property is "attached by beat of drum, or in such other "mode as may be customary." Where a sale once advertised is postponed indefinitely, a new proclamation is just as necessary as a proclamation of the day originally fixed. The substituted sale, when ordered to take place, is an intended sale, within the meaning of the Act, of which notice by proclamation is required.

It was said in the course of argument that the proclamation was not necessary to be made by beat of drum. It is not material to decide that question in the present case. The question raised is not whether it was necessary to be made by beat of drum, but whether it was necessary to be made at all. Mr. Justice Seton-Karr considered that the defendant was precluded by his former conduct from taking any objection to the want of proclamation. The ground upon which that opinion of Mr. Justice Seton-Karr was formed is, that the decree was a very old one, and that the sale had been postponed from time to time at the appellant's instance; and that nothing had resulted from the postponements that had taken place. The age of the decree cannot affect the decision as to whether a sale to be made in execution of it ought to have been duly proclaimed. The postponements took place with the consent of the Court, and, therefore, they must be considered as reasonable and proper. I cannot suppose that the Court would have given effect to the application for postponement unless it had been satisfied that they ought to be made.

Mr. Justice Seton-Karr says: "The sale "of the property has now been postponed no "less than eleven times, on one pretext or "another; and we may now safely assume "that, though the objections of the debtor "may have been for some cause repeatedly "admitted by the Courts, the real object of "the debtor has been to gain time, and to "hold his creditors at arm's length, and that "he has certainly been successful hitherto "in this object." But, admitting that the defendant's object was to gain time, the Court allowed the postponements, and there is no good reason why, when the estate ultimately goes to sale, the property of the defendant is to be sacrificed for want of proclamation, giving public notice of the time and place of sale. Mr. Justice Seton-Karr thinks that the case should not be sent back again for further enquiry as to whether a proclamation took place, and he says: "To "rule otherwise, to direct that on any objec-"tion put forward at the eleventh hour of "the twelfth series of objections by a debtor "who has baffled his creditors pertinaciously, "and who is not shown to have paid up any

"portion of his debt, would be, it seems to "me, to make our Courts minister to the "fraud and injustice attempted by thoroughly unscrupulous debtors who are hopelessly involved, and who have no intention "of satisfying their creditors. On the "ground, then, that the appellant has put "himself in such a position that he ought "not to be allowed to claim the intervention "of the Courts, and that there is no ground "to think that he could ever prove that he "had sustained any substantial injury which "he would have to do, even if he could "make out that there had been a material "irregularity, I would reject this application "with costs, and would not grant the remand "asked for."

But we must be careful, whilst endeavouring not to minister to the fraud and injustice of unscrupulous debtors on the one hand, not to do injustice or to incur the risk of allowing injustice to be done to such debtors when their property is decreed to be sold. The estate of a debtor might easily be sacrificed for want of public notice of sale, and allowing the property to be sold at the time and place not previously made known to the public, merely because the Court may have considered it reasonable to postpone the sale from time to time even to the extent of eleven times. The appellant says, in one part of his case, that the property was worth three lakhs of rupees, and that in consequence of the proclamation not having been duly made, the property was sold for 16,500 rupees. He says now that it is worth 75,000 rupees, and that it was sold for 16,500 rupees. Was not the defendant at liberty to show that his property was worth 75,000 rupees, and that it was actually sold to the execution-creditor, as, in fact, it was for 16,500 rupees, owing to the absence of public notice of the time and place of sale? It is always necessary to watch with jealousy sales made in execution of decrees, especially when it appears that the property has been sold much below its value, and that the execution-creditor was the purchaser. If, in such a case, the formalities which the law requires to ensure, as far a possible, a sale at a fair value, have not been gone through, is it unreasonable to set aside the sale, and require a fresh sale to take place? Public notice of the time and place of sale is one of the most important measures towards ensuring a fair sale. If the execution-creditor has not purchased at too low a price, he will not be damnified by having the estate again put up to auction. The Judge may have erred in allowing the sale to be postponed eleven times. If he was misled by any false statements, the party making them is liable to punishment; but, when the sale was eventually ordered to be made, every means should have been taken to prevent, as far as possible, the property from being sold under its value.

It was contended, in argument, that the present objection cannot be taken under the grounds of appeal filed.

The following is the first ground of appeal:—

"The judgment-debtor's first objection "was, that the proclamations were not issued "in the Mofussil, and the sale was irregular: the Judge, without taking the proofs "upon this point, rejected the petition on "the very day it was presented. The Judge's "decision is defective and contrary to law."

By the words "without taking proofs," I understand the appellant to mean "without taking legal evidence."

Now the Principal Sudder Ameen says:—

"The Court observes, with regard to the "first objection" (that no proclamation of sale was made by beat of drum), "that from "the Nazir's reports, dated 23rd, 24th, 29th, "and 30th Sraban 1271, and the receipts "given by the Chowkeedar, it appears that the proclamation of the said sale was duly "made by beat of drum."

Mr. Justice Loch thinks that the Chowkeedar's receipts and the Nazir's reports are not to be taken as evidence *per se*, but that they must be proved as any other documentary evidence is proved.

A Sheriff's return in England is taken as evidence. But the Sheriff is very different from a Nazir. The Sheriff is generally a man of large fortune, and, if he make a false return, he can be sued for damages for any injury occasioned thereby. The Nazir is not in the same position. He is not, as a general rule, a man able to pay large damages, and in this case it is said that property worth 75,000 rupees was sold for 16,500 rupees. Besides, the Sheriff returns facts; a return that he has been told so and so by the Sheriff's Officer would be a bad return. Here the Nazir does not return, as a fact, that the proclamation was made, but merely that the peon has reported so to him.

I have taken down a translation of the Nazir's return. It says: "From the report of the bearer of the Hookoomnamah, "it appears that the peon went to the "Mofussil, and proclaimed in the talook-

"dar's Cutcherry by beat of drum; and "that, having proclaimed it in the Mofussil, "he posted on the public door of the Cut-"cherry, and he has brought separate re-"ceipts from Chowkeedars of those vil-"lages." Why was not the bearer of the Hookoomnamah, or the peon, called to prove the fact? The peon should have been called to prove whether the statemant was true or not. The Chowkeedar's receipts ought not to be taken as perfect verity, and to be admitted as proof of the facts stated therein. It would be very dangerous to treat the certificate or receipt of a Chowkeedar as evidence of the fact stated in it. I, therefore, think that the evidence on which the Principal Sudder Ameen acted was not legal evidence, and I agree with Mr. Justice Loch that the Principal Sudder Ameen should not have placed implicit reliance on the Nazir's return or the Chowkeedar's receipts; but that the fact of the proclamations having been made should, when disputed, have been proved on oath or affirmation as any other fact. If a man makes a false statement on oath, he is liable to be punished in a Court for perjury. But how could the Nazir be punished if it should turn out that the peon falsely reported to him that the proclamation had been made?

The next ground on which the Principal Sudder Ameen rejected the application was this—he says: "It further appears that "a petition to this effect had once before "been filed, but my predecessor rejected it, "and no appeal was preferred against such "order." Now, Mr. Justice Loch has shown what that application to the predecessor was. It was not an application to set aside the sale, because a proclamation had not been issued, but it was simply an application to stay the sale until an application could be made to the High Court. The predecessor refused to postpone the sale, but that was a very different thing from refusing to set aside the sale after it had been made, because no proclamation had been made. As observed by Mr. Justice Loch, "the rejection "of the petition, without enquiry by the "former Principal Sudder Ameen previous-"ly to the sale, is no sufficient reason for "not investigating the objection when brought "after the sale."

It appears to me that the decision of the Principal Sudder Ameen's predecessor had nothing to do with the case brought before the Principal Sudder Ameen. I therefore hold with Mr. Justice Loch that a new proclamation was necessary, that the Principal Sudder Ameen decided that a proclamation had been made upon improper evidence, and that he acted on a decision of his predecessor which had nothing at all to do with the case before him. I think that the case ought to go back on the points upon which Mr. Justice Loch considered that it ought to be remitted to the Principal Sudder Ameen; and I think that the ground on which Mr. Justice Seton-Karr considered that the defendant could not be allowed to object to the sale, because he had previously made eleven applications to postpone it, is not a sufficient ground to preclude the defendant from coming forward to prove that proclamation was not duly made, and that in consequence his property has been sacrificed. I think that the defendant is entitled to have that question tried, and to be at liberty to produce his evidence, and to prove that those receipts of the Chowkeedars, which, he says, are merely fictitious, are really so, and that some, or one, of the Chowkeedars, who are said to have given the receipts, died, as the appellant alleges, several years before the receipts purport to have been given.

Whatever the final result of the case may be, I think it ought to go back upon the ground of error in law. I think I have a right to determine this question, under Section 23 of Act XXIII. of 1861, as a question of law which has been referred to me, *viz.*, that the Principal Sudder Ameen acted upon improper evidence in upholding the sale without entering into the proper evidence to show whether proclamation had been duly made or not.

I have gone into this case at length, because I have frequently observed the loose evidence which is allowed by the Lower Courts in proof of matters of fact in the course of procedure, such as the making of proclamations, the service of process, and of notices of appeal, and other matters of the like nature. Instead of requiring legal evidence to prove service of notice of appeal and the like, the Lower Courts frequently take the returns of the Nazir and receipts of Chowkeedars without obliging the Nazir and the Chowkeedars to pledge themselves on oath or affirmation to the facts certified. On more than one occasion I have had respondents come forward after an appeal has been decided in their absence, alleging that they had no notice of the appeal; and upon requiring the evidence of service to be sent up, and referring to it, it has turned out to be a mere certificate of a Chowkeedar or a return of a Nazir, stating that the peon employed to

serve the notice reported to him that it had been served. The case must be remanded for the purpose stated by Mr. Justice Loch.

The 31st May 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Attachment (of right to appeal and for future maintenance)—Decree-holder (Interference with, by the Court).

Case No. 144 of 1865.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Sarun, dated the 9th March 1865.

Bipro Protab Sahee (Judgment-debtor), *Appellant,*

versus

Deo Narain Roy (Decree-holder), *Respondent.*

Baboo Onoocool Chunder Mookerjee for Appellant.

Mr. R. T. Allan for Respondent.

A decree-holder cannot be allowed to attach his judgment-debtor's right to appeal or right to future maintenance. Nor can the Court prescribe to the decree-holder what course he is to take for the realization of his claim, or what property he is to attach.

In this case the petitioner objects that the decree-holder has attached his right to appeal to the Privy Council, and we find that the order of the Principal Sudder Ameen is to that effect. The respondent answers that he applied for the attachment of the maintenance and costs of suit awarded to the petitioner under the decree now in appeal to the Privy Council. It is clear that the Principal Sudder Ameen's order, directing the attachment of the petitioner's right to appeal or right to *future* maintenance, cannot be sustained; but the decree-holder is at liberty to attach any claim for maintenance now due and the costs for suit. The Principal Sudder Ameen's order, directing the decree-holder to file a list of other property, is also incorrect, and must be set aside. It is not for the Courts to prescribe to the decree-holder what course he is to take for the realization of his claim, or what property he is to attach and sell in execution. We reverse the Principal Sudder Ameen's order, and direct him to pass a proper order with reference to the above remarks, taking into consideration the provisions of Section 242 of Act VIII. of 1859.

The parties will pay their own costs on this appeal.

The 31st May 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Execution of decree—Rights, &c., of decree-holder.

Cases Nos. 97 to 99 of 1865.

Miscellaneous Appeals from an order passed by the Principal Sudder Ameen of Bhaugulpore, dated the 5th December 1864.

Radha Coomar Singh and another (Judgment-debtors), *Appellants,*

versus

Luchmee Chund Marwaree and another (Decree-holders), and others (Auction-purchasers), *Respondents.*

Baboo Tarucknath Sein for Appellants.

Mr. J. Baptist and *Baboo Unnoda Pershad Banerjee* for Respondents.

A judgment-creditor held a mortgage of certain property belonging to his debtor as security for the loan for which he obtained his decree. Held that the creditor could proceed against any property belonging to the debtor, but, by doing so, would throw up his lien on the property pledged to him.

These are three appeals: Nos. 97 and 98, in which Dyaram, the decree-holder, is respondent; and No. 99, in which Luchmee Chand, decree-holder, is respondent.

Dyaram held a mortgage on certain property belonging to the judgment-debtor as security for his loan, and obtained a decree for the amount. Instead of going against the property pledged, he attached other property in execution, and caused it to be sold; and, under the terms of his bond, we consider that he had full power to do so.

Luchmee Chand also held a money-decree against the same judgment-debtor, and, instead of selling the villages pledged to him for security, proceeded against other property. His bond was not in the same large terms as those entered in the bond of Dyaram; but his decree did not direct the sale of the property pledged, and the question in regard to him is, whether he should have gone against the property pledged to him which was still in the hands of the judgment-debtor, or was he at liberty, as the holder of a simple money-decree, to go against any property in the possession of his debtor? We think that the judgment-creditor might proceed against any property belonging to his debtor; but, by so doing, he threw up his lien on the property which had been pledged. We dismiss these appeals with costs.

The 7th June 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Attachment of Joint Estate under Regulation V. of 1812—Refusal of Collector to distribute surplus proceeds—No appeal (to High Court).

Case No. 218 of 1865.

Miscellaneous Appeal from an order passed by the Deputy Commissioner of Gowalparah, dated the 7th April 1865.

Jugo Moyee Chowdhrain and another, *Appellants,*

versus

The Government, *Respondents.*

Baboo Mohinee Mohun Roy for Appellants.

Baboo Kishen Kishore Ghose for Respondents.

An appeal does not lie to the High Court from an order of a Collector refusing to distribute amongst the shareholders the amount of their shares of the surplus proceeds of a joint undivided estate attached and administered under Regulation V. of 1812.

Note by the Deputy Registrar.—THIS is a case of a joint undivided estate in Gowalparah (Assam), which, owing to contentions among the shareholders, was attached under Regulation V. of 1812, and, under Section 3. Regulation V. of 1827, was placed under the management of a surburakar.

Two of the shareholders, being dissatisfied with this arrangement, applied to have the surburakar removed, and to have the estate placed under the direct management of the Collector of Gowalparah.

Accordingly, the surburakar was removed, and the Collector took upon himself the management of the estate, and, for a time, in compliance with the orders of the Civil (or Deputy Commissioner's) Court, obtained by the said two shareholders, he distributed among the several shareholders the surplus proceeds of the estate.

Doubts having arisen as to the power of the Civil Court to interfere in the management of the estate to the extent above indicated, a reference was made by the Commissioner of Assam, on that among other points, to the Board of Revenue.

The Board, in reply, communicated in the 3rd para. of its Secretary's letter No. 21 of the 17th of February 1865 (in the file) the following instructions on the point:—

"The Collector is not bound to carry out "any order of the Civil Court, but such as "is authorized by the law. If he receive "any order beyond the law, such as an "order to pay the surplus proceeds to the "quarrelling shareholders, it is his duty to "remonstrate; and, if the Court should still "refuse to retract the order, the Collector "should represent the case through the "Commissioner to the Board, in order that "the interference of the High Court might "be evoked."

The order against which the Board has taken objection is evidently an extra-judicial order of the Civil Court, and not an order in a case sued out in proper form.

The Commissioner, on receiving this communication, forwarded it under cover of a roobakary to the Deputy Commissioner for such orders as he might consider necessary; and that Officer, thereupon, suspended his order for the distribution of the surplus proceeds among the shareholders.

Subsequently to this, the said two shareholders applied to the Deputy Commissioner for payment to them of a deposit in his Court, amounting to Rupees 118, as their share of the surplus proceeds for the years 1859, 1860, 1862, and 1863; and on the ground that he had already passed orders relative to the distribution of these proceeds, the Deputy Commissioner dismissed the said application.

From this order the said two shareholders appeal to this Court.

On reference to the vernacular heading to the grounds of appeal, it will be seen that the appeal is preferred under Section 26, Regulation V. of 1812.

This Section and Section 27, referred to in the first of the grounds of the appeal, relate to the *appointment* and *removal* of *managers*, and are modified by Regulation V. of 1827, which provides for an appeal, not to the Provincial Court as before, but to the Board of Revenue, *vide* Section 3.

This appeal, however, seems to me to be, not for the removal of the manager, but against an order of the Civil Court, refusing to act extra judicially, and to interfere with the management of the Collector by making an order for distribution by him, among the shareholders, of the surplus proceeds of an estate attached and administered under Regulation V. of 1812.

Hence, it does not appear that an appeal against such an order will lie to this Court, and I therefore beg, before proceeding to register the appeal, and to prepare it for hearing by the Court on its merits, to submit the question for an authoritative ruling of the Miscellaneous Bench.

Order.—We have heard both parties on this case, but the Government pleader has urged that there is no law under which an appeal will lie to this Court from the order of the Collector refusing any longer to distribute the amount of their shares amongst the shareholders. The pleader for the appellant, discarding Regulation V. of 1827, relies on Sections 26 and 27 of Regulation V. of 1812. But we find these Sections refer to the appointment and conduct of the manager of an attached joint-estate. Now, the Collector is not the manager in reference to the order complained of, and the said order is not appealable under that law, no other law being cited. The order as to the sale of the estate, of which something is said to show the hardship of the case, is one which should be appealed to the Board, and with regard to the appropriation of shares, which touches the merits of the case sought to be appealed to us, the petitioners should either settle their disputes amongst themselves, or should show in the proper quarter that the retention of a manager is no longer necessary. We must, in this view, refuse to interfere in the case at all, and dismiss the appeal with costs. The papers filed by the appellant may be returned to him.

The 7th June 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Right of action (Attachment of).

Case No. 169 of 1865.

Miscellaneous Appeal from an order passed by the Additional Judge of Burdwan, dated the 28th January 1865, reversing an order passed by the Principal Sudder Ameen of that District, dated the 29th June 1864.

Mr. E. J. Drury (Decree-holder), *Appellant,*

versus

radhun Bhuttacharjee (Judgment-debtor), *Respondent.*

Baboo Gopal Lal Mitter for Appellant.

No one for Respondent.

A right of action is not liable to attachment.

THERE is no one for the respondent in this case, and we have heard the pleader for the appellant against the order of the Judge. No precedent can be produced in favor of the view taken by the appellant. The nearest thing that can be adduced is, the sale of a decree by one party, or of a right to sue. But this is a different thing from *attaching* a right of action in a hostile point of view, and thus, perhaps, hindering the suit from ever proceeding to trial. It seems very doubtful whether it could be the policy of the law to encourage such transactions. And, looking to the language of Section 205 of Act VIII. relied on by the Judge, we do not think that the right now sought to be attached comes fairly under that Section, or under the words "all other property whatsoever, moveable or immoveable, belonging to the defendant," for such an uncertain thing, as a right of action cannot have been intended by the use of such terms.

On the whole, then, we see no reason to interfere with the Judge's decision, and dismiss this appeal.

The 14th June 1865.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Holders of Certificate under Act XXVII. of 1860—Negotiation of Government Securities.

Case No. 251 of 1865.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 27th March 1865.

Sreemutty Bhuggobutty Debia and another *Appellants.*

Baboo Bhowanee Churn Dutt for Appellants.

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A Judge can, under Sections 8 and 21 of Act XXVII. of 1860, empower the holders of a certificate under that Act to negotiate a Government Security mentioned in the will.

THIS was an application by the holders of a certificate under Act XXVII. of 1860 for power to negotiate a certain Government Security mentioned in the will, which the executors of the will, who have obtained the certificate, are therein enjoined to negotiate in a certain manner.

The Judge has refused the request, because he is of opinion that the law does not give him authority to act, and because there may, hereafter, be disputes regarding the security.

We think the Judge had full power, under Sections 8 and 21 of Act XXVII. of 1860, to pass the order asked for. He may exercise his discretion as regards complying with the request of the appellant, but he must exercise a reasonable discretion. It is not sufficient that the sons may hereafter raise some objection to the transfer of the note. In this case, the deceased person, in his will, actually directed the transfer; and, unless some better objection than that given by the Judge should be raised, we think that the Judge should empower the certificate-holders to negotiate the security, and the case will be returned to him for that purpose.

The 14th June 1865.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Special Appeal—Small Cause claims.

Case No. 159 of 1865.

Miscellaneous Appeal from an order passed by the Judge of West Burdwan, dated the 21st January 1865, reversing an order passed by the Moonsiff of that District, dated the 3rd December 1864.

Bholanath Dutt (Decree-holder), *Appellant,*

versus

Mohadeb Sheet and others (Judgment-debtors), *Respondents.*

Baboos Nilmadhub Sein, Rajendur Misser, and *Bhuggobutty Churn Ghose* for Appellant.

Baboo Prosunno Coomar Sein for Respondents.

Section 27 of Act XXIII. of 1861 is prospective, and does not, therefore, bar a special appeal from a decision passed before that Act in cases of a Small Cause Court nature.

The right reserved to parties in pending suits under Section 387 of Act VIII. of 1859 does not refer to Section 7 of Regulation VII. of 1832, which bars a special appeal in such cases.

THE respondent takes a preliminary objection that no special appeal will lie under Section 27 of Act XXIII. of 1861, inasmuch as this case is of the nature of a Small Cause Court case. But that Section is clearly prospective, and the decision sought to be carried out was obtained long before the passing of that Act.

The respondent next pleads that, under Section 387 of Act VIII. of 1859, he is entitled to the benefit of Section 7 of Regulation VII. of 1832, which barred all special appeals in these cases. But the two laws seem to us to have no connection, and the right reserved to parties in pending suits under Section 387, quoted above, do not refer to or contemplate any such provisions as those laid down in Regulation VII. of 1832.

We, therefore, overrule these points, and come to the merits of the appellant's pleas, and we find that the Judge has really missed the point before him. He does not seem to understand what was meant by the judgment-debtor when he said notice was not served on him. It is clear to us that the debtor meant to raise this issue of fact, *viz.*, was the notice really served on a former occasion so as to keep the decree alive? This is a matter of fact and evidence, of which the Judge should dispose as the Moonsiff has done. We remand the case in order that the Judge may find whether the notice was really served or not. We are of opinion that, if the notice was served, the decree would be kept alive.

The 14th June 1865.

Present:

Execution of decree—Security.

Case No. 175 of 1865.

Miscellaneous Appeal from orders passed by Mr. W. Da Costa, Principal Sudder Ameen of Purneah, dated the 3rd and 20th February 1865.

Luchmeeput and another (Decree-holders), *Appellants,*

versus

Mir Mahomed Lukee Chowdhry and others (Judgment-debtors), *Respondents.*

Mr. R. T. Allan and *Baboos Banee Madhub Banerjee* and *Bungshee Buddon Mitter* for Appellants.

Mr. A. F. Lingham for Respondents.

A decree-holder is entitled to execute his decree without security, notwithstanding that his debtor has a suit which has been dismissed, but which he has appealed to the Privy Council.

THE Lower Court has dismissed the decree-holder's application to execute his decree against the debtor, because he has failed to comply with that Court's directions requiring him to furnish security before proceeding in execution. It is urged that the decree is final, and should be executed without hindrance of any sort. But, for the debtor, it is contended that he has a suit for a large sum of money against the decree-holder, which has been dismissed by the High Court, but which he has appealed to the Privy Council; and, under Section 209 of Act VIII. of 1859, he has a right to ask the Court to stay execution of the decree which has been obtained, until a final decision is passed upon his case by the Privy Council. We think that this Section is hardly applicable under the circumstances: the one case having been finally decreed, and the other dismissed by the High Court. The decree-holder should be permitted to execute his decree without security. The debtor asks for time to pay in the sum due from him. A month is given for this purpose, during which execution will not be taken out.

The 22nd June 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr *Judges.*

Paupers (Representatives of).

Case No. 201 of 1865.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Cuttack, dated the 19th January 1865.

Bhagbut Doss (Plaintiff), *Appellant,*

versus

Buloram Doss (Defendant), *Respondent.*

Baboo Tarucknath Sein for Appellant.

No one for Respondent.

There is no necessity for an enquiry whether an alleged representative of an admitted pauper is a pauper or not. The Court, if satisfied that he is the legal representative, ought to admit him to carry on the suit.

IT is true that there would be no appeal to us against the orders of a Court finding, on enquiry and evidence, whether a plaintiff was a pauper or not. But that is not the point in this case. There was really no necessity for enquiry whether the applicant, who claimed to be the representative of an admitted pauper, was a pauper or not. No such provision is found in Chapter V. of the Civil Code. The Court, if satisfied that the appellant was the legal representative of the deceased, ought to have admitted him to carry on the suit under Section 102. This the Court should now have an opportunity of considering, and we order him to take up the case at once. If he be satisfied that the applicant is the real representative of the pauper, he should then pass proper orders as to the re-admission of the suit, which the Court evidently considers to have abated as a mere consequence of its own order in the Miscellaneous Department.

Case remanded accordingly.

The 6th July 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Limitation (Process of Execution)—Costs—Interest on Costs.

Miscellaneous Appeal from an order passed by the Judge of Behar, dated the 13th February 1865.

Singh and others (Decree-holders), *Appellants,*

versus

Lalla Kalee Churn (Judgment-debtor), *Respondent.*

Mr. R. E. Twidale for Appellants,

Baboo Debendro Narain Bose for Respondent.

The period of limitation for taking out execution of a decree counts from the date of the final judgment in the case.

An appeal "dismissed with costs" means that the appellant should pay the costs of the respondent.

Interest on costs is given even when not specifically mentioned in the order.

THIS was a suit for "execution" in regard of costs obtained by the petitioner in a series of cases in which the other side were plaintiffs. It appears that the first decree (a modified one) was obtained by the plaintiffs on the 15th July 1857. He appealed to the Judge, who, however, disallowed his entire claim, on the ground of limitation, on the 9th of July 1858.

On special appeal to the Sudder Dewanny Adawlut, the case was remanded (9th June 1859) for trial of the merits; and, on the 6th February 1860, the Judge dismissed the plaintiff's claim on the merits.

Another special appeal was preferred to the Sudder Dewanny Adawlut, but the Judge's order was upheld on the 20th July 1862, and an application for review of that judgment was dismissed on the 9th of January 1863.

On application by the defendant for execution for the costs which had been awarded him in all these appeals, the Judge held, as respects the first four decrees, that the application was beyond three years from the original judgment, and was, therefore, barred; and with regard to the other two, he decided that, as there was no special mention in the Sudder Court's decree of the party who was to pay costs, he could not enforce the order against the plaintiffs.

We think that the Judge was wrong in both points. There is nothing in the law which directs that the first judgment is the one from which the limitation period should count, and in the present case the defendant had every reason to delay taking out execution for his original costs. The case was kept by the machinations of the plaintiff continually before the Courts; and, until a final decision was arrived at, the defendant had no means of knowing whether, after all, the costs might not be payable by him instead of to him. In all analogous cases, the "judgment" is understood to mean the final judgment, and we think that it should be so construed in this case, and that the limitation period should count from the time when the matter in dispute was finally settled, and the defendant became rightfully and definitively entitled to costs.

With regard to the Judge's order on the two last appeals, we do not comprehend the difficulty. The Sudder Court's order was "dismissed with costs," the meaning of which was, manifestly, that the party appealing and losing the case should pay the costs incurred by the respondent in defending the Lower Court's decision.

We reverse, therefore, the Judge's order, and direct that the decree-holder be allowed to take out execution in all the cases at any time within three years from the date of the final judgment, *viz.*, from the 15th January 1864: and with regard to interest, the Judge will follow the usual practice, which gives interest on costs even when it is not specifically mentioned in the order.

The 10th July 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Sale of ancestral property in execution of decree for ancestral debt—Change of possession immaterial.

Case No. 235 of 1865.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Mymensing, dated the 18th February 1865.

Bungshee Mohun Doss (Decree-holder), *Appellant,*

versus

Rajah Raj Kishen Singh (Judgment-debtor), *Respondent.*

Baboos Onoocool Chunder Mookerjee and *Romesh Chunder Mitter* for Appellant.

Baboos Unnoda Pershad Banerjee and *Dwarkanath Mitter* for Respondent.

The mere change of possession of ancestral property will not protect the property from liability to sale in execution of a decree for an ancestral debt. The property may be proceeded against in whoseever hands it may be.

THE appellant's father had a claim against Bishonath, Juggunnath, and Gopeenath, the joint-proprietors of Pergunnah Shoosong, for Rupees 33,000. Indro Monee, the widow of Juggunnath Singh, gave a kistbundee for her husband's share of the debt. After the death of Juggunnath, his widow adopted a son, Sree Kishen Singh, and the appellant brought a suit against him through his guardian, Ram Churn Mojoomdar, to recover the amount of this debt, and obtained a decree on 26th August 1859. Sree Kishen was then in possession of the share of Juggunnath Singh through his guardian, and his possession had been affirmed by an award under Act IV. of 1840. Subsequently, a suit was brought by Pran Kisto Singh, son of Bishonath Singh, and now represented by Raj Kishen Singh, to set aside the adoption; and he obtained a decree on 25th September 1858. The appellant now seeks to execute his decree against Raj Kishen, as representative of Juggunnath Singh, and in possession of his property, the debt being incurred on account of Juggunnath Singh, and the decree making his property liable for the debt.

It is urged that, as Pran Kishto was not made a party to the suit brought by appellant to recover the debt due by Juggunnath, the respondent, who now represents Pran Kishto, cannot be held responsible for the amount, though he be in possession of the property of Juggunnath. Further, that appellant was aware, when he brought his claim against Sree Kishen and his guardian, that the respondent's father had already brought an action to set aside the adoption of Sree Kishen, and, under these circumstances, the appellant should either have waited the result of that suit or made Pran Kishto a co-defendant; that as the respondent has had no opportunity of answering the appellants as to his claim, the only course to be followed is for plaintiff to bring a fresh action against the respondent.

The suit, we think, was rightly brought against the party in *de facto* possession of the estate, and having at the time a good title so far as the plaintiff was concerned. The debt was not personal, but a debt of the ancestor for which the ancestral property was liable, and, though the respondent's father was then a claimant for the estate, he could not be held liable for the debt till he had proved his title to the same. His having filed a suit for that purpose previous to the plaintiff's present action did not, we think, render it obligatory on plaintiff, appellant, to make him a party to this suit. It might have been advisable as a matter of precaution, but there was no necessity for so doing. The decree is given against the estate of Juggunnath; and whether that property be found in the hands of Sree Kishen or in the hands of Raj Kishen, we think it equally liable for the appellant's claim. The mere change of possession will not release the property from liability to sale, or render the present decree infructuous, or render a fresh suit against the party now in possession necessary. We see no reason why appellant should not proceed against the property of his debtor in whoseever hands he finds it; and we, therefore, reverse the order of the Lower Court, and decree this appeal with costs.

The 12th July 1865.

Present:

The Hon'ble G. Loch and F. A. Glover.
Judges.

Appeal (from orders passed in execution of decree)—Disputed property—Section 229, Act VIII. of 1859, applicable to claimants other than defendants.

Miscellaneous Appeal from an order passed by the Judge of Behar, dated the 13th February 1865.

Goburdhun Sahoo Mistree and another (Objectors), *Appellants,*

versus

Issuree Nund Dutt Jha (Decree-holder), and Parbutty Churn Jha and others (Judgment-debtors), *Respondents.*

Baboo Mohendro Lal Shome for Appellants.

Baboo Juggadanund Mookerjee for Respondents.

According to Section 283, Act VIII. of 1859, orders passed in execution of decree are not appealable; and by section 11, Act XXIII. of 1861, the power of appeal is restricted to cases in which the appellant was one of parties to the original suit.

Section 229, Act VIII., does not apply to persons in possession of disputed property in right of the defendant.

WE see no reason to interfere with the Judge's order in this case. Section 283 of the Civil Procedure Code lays it down distinctly that such orders passed in execu-

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tion of decree are not appealable; and Section 11 of Regulation XXIII. of 1861, although extending the law somewhat, still restricts it on appeal to cases in which the appellant was one of the parties to the original suit. Now, in the present case, the appellant was no party to that suit, and, therefore, no appeal lies.

His vakeel refers to Section 229 of the Code as strengthening his case. But that Section, we observe, applies to parties in possession of the disputed property on their own account, or on account of some other person than the defendant. The appellant, in this case, is in possession in right of the defendant, and the Section, therefore, does not apply to him.

The principle of this appeal has been decided many times by this Court, and a late ruling of the Full Bench on the point renders all further argument unnecessary. Following that ruling, we dismiss this appeal with costs.

The 20th July 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Special Appeal (from orders passed under Sections 5 and 6, Act XXIII. of 1861, and Section 347, Act VIII. of 1859).

Case No. 259 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 14th February 1865, affirming an order passed by the Sudder Ameen of that District, dated the 28th September 1864.

Dinobundhoo Chatterag, *Appellant,*

versus

Beharee Lal Mookerjee, *Respondent.*

Baboo Khetturnath Bose for Appellant.

Baboo Brojendro Coomar Seal for Respondent.

A special appeal lies from an order passed under Sections 5 and 6, Act XXIII. of 1861 (dismissing an appeal for non-service of notice in consequence of failure to deposit the cost of issuing the same) as from an order under Section 347, Act VIII. of 1859 (re-admitting an appeal dismissed for default of prosecution).

We think that a special appeal from an order passed under Sections 5 and 6 of Act XXIII. of 1861 will lie to this Court as from an order under Section 347, Act VIII. of 1859. But, in the present instance, we agree with the Judge in considering that the plaintiff has not shown sufficient cause to admit of his appeal being revived, for his personal attendance was not required, but he was required to deposit money which he could have done through his servants. This application is rejected with costs.

The 20th July 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Kistbundee—Absence of endorsement—Proof of payment.

Case No. 248 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Behar, dated the 16th February 1865, affirming an order passed by the Sudder Ameen of that District, dated the 6th September 1864.

Girdharee Singh and others (Judgment-debtors), *Appellants,*

versus

Lalloo Koonwur (Decree-holder), *Respondent.*

Baboos Mohinee Mohun Roy and *Debendro Narain Bose* for Appellants.

No one for Respondent.

The mere absence of an endorsement on the back of a kistbundee cannot prevail against positive proof of payment.

Two grounds of appeal are urged before us:—

(1.) That the Judge is wrong in rejecting evidence of payment, merely on the grounds that these payments are not endorsed on the back of the kistbundee; and

(2.) That he has refused to entertain the plea of limitation put forward by the appellant.

We think that both these objections must be allowed. With regard to the *first*, it has been ruled many times by the late Sudder Court that the mere absence of an endorsement on the back of a kistbundee cannot prevail against positive proof of payment. In this case, the appellant produced acquittance, and summoned the respondent's own son to prove it. This evidence ought to have been gone into, as, if genuine, it would have been legally sufficient to prove payment—the absence of endorsement on the kistbundee notwithstanding.

On the *second* point, we find that execution was not taken out till 1271 B. S. The last admitted payment was made in 1264, so that the decree-holder would only be entitled to the instalments for the three years immediately preceding his taking out execution; with regard to the years 1265, 1266, and 1267, his claim would be barred by limitation.

We remand the case, therefore, to the Court of first instance for enquiry into the proof of the alleged payment. Should that fail, the judgment-debtor will be made liable only for the instalments due on the years 1268, 1269, and 1270.

Costs will follow the result.

The 26th July 1865.

Present :

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Sale in execution of decree—Holidays other than fixed holidays.

Case No. 260 of 1865.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 8th February 1865, affirming an order passed by the Moonsiff of that District, dated the 23rd December 1864.

Haro Jemadar and others (Judgment-debtors), *Appellants,*

versus

Jadub Chunder Holdar (Decree-holder), *Respondent.*

Baboo Obhoy Churn Bose for Appellants.

No one for Respondent.

A sale in execution of a decree is illegal, if made on a day which, though not a fixed holiday, yet was a day on which the Courts were closed by order of the High Court, and therefore as much a holiday as any other fixed holiday.

It appears that the Moonsiff, after putting up the petitioner's property to sale, allowed him a month to pay in the amount of the decree against him. Petitioner deposited the amount in the Collectorate, and got a receipt; but, owing to the Moonsiff's absence from illness, as he alleges, he was unable to put it in, and subsequently the Moonsiff, thinking that the money had not been deposited, confirmed the sale. The petitioner appealed to the Judge, who rejected the application. Two grounds of appeal were taken before him: *1st*, that the sale was made before the Court re-opened after the vacation; and, *secondly*, that the property was sold for an inadequate price. The Judge was quite right in rejecting the second objection, but we do not understand the reason assigned by him for rejecting the first, which is this: That the day was not a "holi-" day, and it does not affect the question that "the Courts were allowed for convenience "sake to remain closed." If the Courts were closed by order of the High Court on the day when the property was sold, that day must be considered as much a holiday as any other fixed holiday. Now, we find that the Civil Courts were closed in 1864, by order, from 1st October to 15th November inclusive, and we do not understand how the sale took place during that period, *viz.*, 7th November. We consider, therefore, that the sale being made on a holiday was illegal, and must be set aside, and we, therefore, reverse the orders of the Courts below. Petitioner will pay his own costs.

The 26th July 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Execution of decree—Mesne-profits (Mode of estimating)—Onus probandi.

Case No. 287 of 1865.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 22nd April 1865, amending an order passed by the Principal Sudder Ameen of that District, dated the 27th January 1865.

Dinobundhoo Nundee (Judgment-debtor), *Appellant,*

versus

Keshub Chunder Ghose (Decree-holder), *Respondent.*

Baboo Bungshee Budden Mitter for Appellant.

Baboos Greesh Chunder Ghose and *Debendro Narain Bose* for Respondent.

What are mesne-profits liable in execution of decree; how they should be ascertained, and on whom lies the *onus* of proving the actual amount.

We think that the mesne-profits in this case have been estimated on an entirely erroneous principle. Mesne-profits, as we scarcely need remark, are the assets of an estate *minus* costs of collections, Government revenue, losses by desertion and death of ryots, by drought, &c. Deducting these and similar items, whatever remains which the party in possession has collected from the ryots, or might, with due diligence, have collected, is the sum for which the party against whom the decree has passed is liable. The Judge has very properly set aside the calculation of the Ameen, which is formed apparently on a probable estimate of what the estate might yield; but he has himself taken, as we think, an erroneous method of determining the sum due, *viz.*, an account of collections made by the decree-holder since he recovered possession, from which he has deducted a certain percentage. The proper method for ascertaining the amount of mesne-profits is to require the party who has held possession, and against whom the decree has passed, to produce his accounts, and if he fail to attend or comply with the requisition, he should be compelled to do so by the Court on the application of the Ameen. His accounts should be compared with the pottahs and dakhilas of the ryots, or, in the event of there being no pottahs, with the dakhilas only; and each ryot producing his dakhilas should be examined on oath, as should the party by whom such dakhilas were given. Should the judgment-debtor fail to produce his accounts, the dakhilas produced by the ryots will be the basis for estimating the mesne-profits. Where lands have been held by a proprietor in his own occupancy, and he fail to show the value of the produce realized from such lands, this must be estimated from the information gained from the evidence and receipts of the tenantry. Until all endeavours to ascertain the real assets of the property during the incumbency of the judgment-debtor fail, the amount of mesne-profits should not be arbitrarily assumed. On the judgment-debtor, as the party in possession, and having the means of information, lies the *onus* of proving what is the actual amount of mesne-profits; and, if he fail to produce his accounts, or otherwise impede the action of the Court by neglect or excuses, or other insufficient cause, he will only have himself to blame if the amount awarded against him is much larger than it would have been had he come forward honestly to assist the Court. In this case we do not perceive that any of the steps for ascertaining the mesne-profits have been properly taken. We, therefore, remand the case for re-investigation with reference to the above remarks.

The 27th July 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Religious endowment—Right of co-sharer to recover possession is personal not hereditary—Power of widow of co-sharer to sue for sums paid by him for idol's service out of his own funds.

Case No. 264 of 1865.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Nuddea, dated the 1[illegible]th April 1865.

Radha Jeebun Moostofee, *Appellant,*

versus

Tara Monee Dossee, *Respondent.*

Baboos Banee Madhub Banerjee and *Mohesh Chunder Chowdhry* for Appellants.

Baboos Unnoda Pershad Banerjee and *Sreenath Doss* for Respondent.

The right of one of several co-sharers in an endowment to recover possession of the land from which he has been ousted by the

other co-sharers is a personal one, and does not descend to his heirs. A decree for that purpose obtained by him, if not executed by him in his lifetime, will become infructuous after his death. His widow, however, can recover in a regular suit whatever sums be paid out of his own funds for keeping up the service of the idols.

THIS appeal arises out of a suit for execution of a decree passed on a solehnamah. By that deed of compromise, one Surbessur was appointed managing trustee to conduct the worship of certain idols with an annual allowance of 2,900 rupees secured on the revenues of certain villages of which he was to hold possession.

He brought a suit to recover possession of his rights, on the ground that he had been ousted by his brothers, the other co-sharers, in the endowment, and claimed wassilat for the time he had been so kept out of possession, and during which he asserted that he had paid the expenses of the idols out of his own pocket. He obtained a decree for possession on the 30th August 1862; and this Court, before which the case came on appeal, held further that, as the appellant had, without lawful authority, taken the lands which he was bound by the decree to have left in the respondent's possession, he was liable for the usufruct collected during the time of ouster.

Surbessur took no further steps in the matter, and died without executing his decree. His widow is the person now before the Court, and she claims 10,159 rupees principal, and 6,416 rupees interest, on the ground, as stated by her Counsel, though not expressly mentioned in her plaint, that her husband, during the time he was manager of the trust, expended the former sum out of his own resources, not being able, in consequence of having been dispossessed of the assigned villages, to carry on the worship from the funds set apart for it.

The Principal Sudder Ameen has allowed the widow of Surbessur to take out execution against the judgment-debtor, on the ground that, as representative of her husband, she is entitled to succeed to his property.

This order would, under ordinary circumstances, be correct; but in the present case, the Principal Sudder Ameen appears to us to have altogether ignored the special point at issue. He assumes that the objections regarding the alleged breach of trust on the part of Surbessur were disposed of by the High Court in the latter's favour; but this is not the case. This Court simply decided the general principle, that a person, dispossessed unjustly, was entitled to recover not only possession, but mesne profits likewise; it did not take into consideration the special ground of the widow's present claim. It declined to go into the question, and referred the parties to a regular suit. The point, therefore, as to whether Surbessur did or did not expend the endowment-money on the services of the idols, is still undisposed of.

In the present case, it is manifest that the judgment-creditor, in order to take out execution against her late husband's brother (one only of the two appears to have resisted the widow's demand, the other having paid his quota), must show that, during the time of his alleged dispossession, he kept up the religious services out of his own funds. On no other supposition can the widow have any claim. Surbessur had no right to the endowment-monies personally. He was a mere trustee bound to expend all that he received in the service of the idols, and if, for any reason, the whole or any part of these monies remained unexpended, the surplus would not belong to Surbessur's estate, but to the endowment.

Now, we can find no proof whatever on the record that the services of the idols were kept up by Surbessur out of his own resources. It is a mere plea advanced by the judgment-creditor, but unsupported by any evidence whatever.

The circumstances of the case have been so altered since the High Court's decree, that we find it impossible to give the judgment-creditor the benefit of it. That decree proceeded entirely on Surbessur's right to recover possession of the lands. At the time it was passed Surbessur had that right, but his widow is not in the same position; the right was personal to the husband as trustee of the endowment, and did not descend to his heirs. The widow can neither execute the decree for possession, nor for wassilat, as the usufruct of the land would be the property of the endowment. As it stands, the decree, so far as she is concerned, is absolutely infructuous.

Under these circumstances, we have no alternative but to decree this appeal with costs on respondent, and reverse the order of the Principal Sudder Ameen. It is still open to the widow to show in a regular suit that, during the time of her husband's dispossession, he, notwithstanding the failure of the trust fund, paid the expenses of the idol's services at his own cost. If she can prove this, she will be entitled to whatever sums Surbessur so paid, and can recover them from the judgment-debtor.

The 28th July 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Limitation—Admission after execution of decree taken out.

Case No. 308 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 13th May 1865.

Digamburee Debia and another (Judgment-debtors), *Appellants,*

versus

Sharoda Pershad Roy (Decree-holder), *Respondent.*

Baboos Chunder Madhub Ghose and *Ashootosh Dhur* for Appellants.

Baboo Kishen Kishore Ghose for Respondent.

The admission of a debt after execution is taken out gives a judgment-creditor a fresh starting point from which to reckon limitation.

THIS is an application for execution of a decree passed on the 9th of September 1840. The judgment-debtor pleads limitation.

It appears from the record that execution was from time to time taken out, and, on the 8th of July 1863, the appellant filed a petition admitting the debt, and praying that, as she had come to an arrangement with her creditor, the attachment on her property might be removed. There is an endorsement on this petition on the part of the judgment-creditor agreeing to the arrangement.

The appellant's pleader argues that this admission of the debt does not bring the judgment-creditor within time under the provisions of Section 20, Act XIV. of 1859, and that Section 19 of the Act which does refer to such admissions, as giving a judgment-creditor a fresh starting point from which to reckon limitation, applies only to Courts established by Royal Charter, and not to Mofussil Courts at all.

We see no reason to interfere with the Judge's order in this case. We may concede that Section 19 has nothing to do with this suit, and that the wording of Section 20 might, under ordinary circumstances, bear the meaning attached to it by the special appellant's pleader. But, in this case, the debt was admitted after execution had been taken out in 1863. No objection was then taken that the proceedings were barred by limitation; and whatever latches there may have been then on the part of the judgment-creditor, was condemned by the act of the debtor in admitting the claim, and begging for time wherein to pay. This was, we consider, a fresh starting point from which execution should be dated; and, as the present execution was taken out in 1864, there can be no question but that it was fully within time, and we dismiss this appeal with costs.

The 7th August 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Arbitration—Separate awards on case referred by Judge and on other matters referred by the parties.

Case No. 279 of 1865.

Miscellaneous Appeal from an order passed by Mr. E. Pearson, Judge of Tirhoot, dated the 21st February 1865, affirming an order passed by the Moonsiff of Durbhangah, dated the 9th September 1864.

Baboo Roghoo Nundun Lall Sahoo and others, *Appellants,*

versus

Bunwaree Lall Sahoo, *Respondent.*

Baboo Mohesh Chunder Chowdhry for Appellants.

Mr. R. E. Twidale for Respondent.

Arbitrators should give separate awards in a case referred to them by the Judge, and on other matters referred to them by the parties, instead of mixing them all up and giving a general award.

THIS suit was originally brought by the plaintiff (special appellant here) against one

Bunwaree Lal to recover possession of eight *doons* of land. The Moonsiff dismissed it on the 8th October 1860, but on appeal the Judge referred it to arbitration.

The award was eventually in plaintiff's favor, and the Judge decreed accordingly.

It now appears that these same parties had appointed the same arbitrators for the disposal of other matters not connected with this suit, and the arbitrators, instead of giving a separate award in the case referred to them by the Judge, mixed all the cases up together, and gave a general award.

The judgment-creditor now wishes to take out execution against the special appellant in respect of those other matters in which he was successful, which were not made over by the Judge to the arbitrators, and were not before the Court at all.

We think it impossible, as the case stands at present, to pass any orders regarding "execution." The Judge must return the papers to the arbitrators, and desire them to separate their awards the one from the other. The procedure in execution would be different in either case; for the judgment-creditor, in the cases not referred to arbitration by the Judge, cannot take out execution in the ordinary way as a decree of Court under Section 325 of the Civil Procedure Code. It must, then, first be distinctly shown what the different awards between the parties are, and then the judgment-creditors, who have been successful in the arbitration, not submitted to arbitrators by the Judge, can apply for execution to issue in the way laid down by Section 327, Act VIII. of 1859.

The Judge's order is reversed with costs on the special respondent.

The 9th August 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Jurisdiction—Grant of compensation on release of attached property—No appeal.

Cases Nos. 203 to 206 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Mymensingh, dated the 21st January 1865, reversing an order passed by the Principal Sudder Ameen of that District, dated the 30th August 1864.

Huro Soonduree Dossee (Decree-holder), *Appellant,*

versus

Bungsee Mohun Doss and another (Objectors), *Respondents.*

Baboo Luckhee Churn Bose for Appellant.

Baboo Onocool Chunder Mookerjee for Respondents.

Compensation under Section 88, Act VIII. of 1859, can only be awarded, on the application of the defendant, by the Court which disposes of the case, and cannot be given by another Court in whose custody certain property belonging to the defendant has been found and attached at the instance of the plaintiff.

No appeal lies from such an order.

We think that in this case the Principal Sudder Ameen of Zillah Mymensingh acted wholly without jurisdiction. Plaintiff brought an action before the Principal Sudder Ameen of Dacca, who directed certain money belonging to the defendant in Zillah Mymensingh to be attached, incidentally stating in that order that, if the suit were dismissed, defendant would be entitled to get interest as compensation on the money so attached. The suit was dismissed, and the money was ordered to be released; but no order for compensation was passed by the Principal Sudder Ameen of Dacca in his judgment. The defendant, instead of applying to the Principal Sudder Ameen for compensation, applied to the Principal Sudder Ameen of Mymensingh, who granted compensation under Section 88 of Act VIII. of 1859, looking apparently at the words of the order of attachment. An appeal was preferred to the Judge of Mymensingh, who set aside the order of the Principal Sudder Ameen as being passed without jurisdiction.

A special appeal is preferred to this Court on the ground that this was an order passed after decree; that against such an order no appeal is expressly provided; and that, consequently, the Judge acted without jurisdiction in receiving and trying the appeal. There certainly appears to be no Section of Act VIII. under which an appeal lay to the Judge from the order passed by the Principal Sudder Ameen. That order was, however, altogether illegal; and, therefore, under the concluding words of Section 35, Act XXIII. of 1861, we reverse the order of the Principal Sudder Ameen, and reject this appeal with costs.

The 10th August 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Plaint—Date of presentation to be noted.

Case No. 329 of 1865.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Midnapore, dated the 18th March 1865.

Sreenath Churn Nundee (Decree-holder), *Appellant,*

versus

Moyna Koomaree Beebee (Judgment-debtor), *Respondent.*

Baboos Dwarkanath Mitter and *Hem Chunder Banerjee* for Appellant.

Baboo Mohendro Lal Shome for Respondent.

Upon the presentation of a plaint, a Judge should cause the date of presentation to be noted on the petition.

In this case, we think evidence should have been taken as to the date when the petition of execution was filed before the execution case was thrown out as barred by limitation. The last process taken out was struck off on 30th December 1861. The decree-holder had, to the 30th December 1864 inclusive, to file a fresh application. His application is dated the 30th of that month, but it is not registered till the 4th January 1865. At the close of the year a number of petitions and plaints are filed, and these very frequently are not registered through press of business, or neglect, or other causes, for some days after they have been put in; and we think that such was probably the case in respect to this application, for it is evident that the petitioner was aware that his time was up on 30th December 1864. If the Lower Courts would only apply the rule laid down in the late Sudder Court's Circular order, 29th July 1859, in respect to plaints to all applications made to them, much trouble and annoyance would be saved to parties having business to transact. The rule is that, upon a plaint being presented, the Judge should cause the date of presentation to be noted on the petition. Nothing could be easier, and it would take no time. We remand the case for evidence to be taken from the petitioner as to the date of presentation.

The 25th August 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Deposit of Tulubana in wrong Court—Revival of appeal.

Case No. 316 of 1865.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Jessore, dated the 31st March 1865.

Mohesh Chunder Bose, *Appellant,*

versus

Bhugoban Chunder Mookerjee, *Respondent.*

Baboo Poorno Chunder Mookerjee for Appellant.

Baboo Kedarnath Moojoomdar for Respondent.

The depositing of *tulubana* in a wrong Court is no ground for the revival of an appeal dismissed for want of prosecution.

This case was struck off by the Lower Court, on the ground that the *tulubana* for service of notice on the respondent, who had not appeared, had not been deposited.

It appears from the record that the requisite *tulubana* had been deposited, but in the wrong, that is, in the Judge's Court; and that notice had in consequence not been served. The Principal Sudder Ameen, however, does not seem to have negatived the petitioner's application on this ground, but because he had allowed two months to elapse before taking any action in the matter.

It is urged, on the other side, that the order passed by the Principal Sudder Ameen was in the nature of a review, and, therefore, no appeal lies.

This argument we think to be erroneous. Section 347 of Act VIII. of 1859 recites that, if an appeal be dismissed "for default of prosecution," &c., &c., such and such action may be taken. Now, this was precisely the state of the present case. The suit had been struck off, because *tulubana* had not been deposited; and the Principal Sudder Ameen, to whom application was made for permission to revive it, refused on the grounds stated. It was not a review of his former order that was sought, but a revival of the original suit.

But we think that the refusal, as regards those respondents who had not appeared, and on whom notice had to be served, was justified, although not for the reasons recorded by the Principal Sudder Ameen. The appellant had every means of knowing

the Court where the *tulubana* was to be deposited, and he was rightly made to suffer the consequences of his own negligence.

But this is no reason why the appeal should not have been allowed to proceed as against those respondents, who appeared of their own accord, and with regard to whom no service of notice was necessary; and we remand the case to the Principal Sudder Ameen for that purpose.

The 31st August 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Decree for Mesne-profits (Enhancement of, on appeal)—Principle of calculation.

Case No. 343 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 13th May 1865, modifying an order passed by the Moonsiff of that District, dated the 31st May 1864.

Ramnath Chowdhry and others (Judgment-debtors), *Appellants,*

versus

Digumber Roy and others (Decree-holders), *Respondents.*

Baboo Greeja Sunkur Mojoomdar and *Moulvie Murhumut Hossein* for Appellants.

Baboo Tarucknath Sein for Respondents.

On the appeal of the judgment-debtor, and without a cross-appeal by the creditor, the Appellate Court should not increase the amount of mesne-profits decreed by the first Court to the creditor, but must determine whether there is any substance in the objections raised by the creditor.

The principle of calculating mesne-profits explained.

In execution of a decree for possession and mesne-profits, the Moonsiff, after having made a local enquiry through an Ameen, held that 75 rupees and some annas was the proper amount of mesne-profits to be recovered by the decree-holders. The judgment-debtor, dissatisfied with the order, appealed to the Judge, who, after requiring further evidence, raised the amount to rupees 358-12. The objections taken in special appeal are—*1st*, that, as the judgment-debtor appealed from the order of the first Court, and there was no cross-appeal by the creditor, the Judge should not have increased the amount of mesne-profits, but merely have determined whether there was any substance in the appellant's objections, and, if not, he should have rejected the appeal. He has, however, treated the case as if the whole were open to him for revision. *2nd*, that, as the whole of the land was in the occupation of ryots, and the judgment-debtor collected rents from them, the amount of mesne-profits should be calculated according to the rents received or receivable during the period of the debtor's possession, and not according to the productive powers of the land. *3rd*, that the Ameen's investigation gave rupees 117-14 as the mesne-profits; but the Judge has exceeded the amount. *4th*, the decree-holder only claimed mesne-profits at 1 rupee per beegah; but the Judge has given him at a much higher rate. *5th*, the Judge, having estimated the productive powers of the land as they are at present, has calculated the mesne-profits at a uniform rate for thirteen years, the period of the judgment-debtor's possession, not taking into account the rise in prices within the last few years, not allowing anything for bad seasons.

We think the grounds taken by special appellant are sound. As the case came before the Judge in appeal, the only question for him to determine was whether there was any substance in the appellant's objections to the Moonsiff's finding. But we think that the mesne-profits have been calculated on a wrong principle. If the land is, as alleged by the judgment-debtor, in the occupancy of ryots, the rents which he has or might have realized with due diligence and care should be taken as the amount of mesne-profits; and it is only where lands are held by a party in his own hands, and are cultivated by him, that the productive powers of the lands should form the basis of estimation. If it be necessary to take these as the ground of calculation, some allowance must be made for bad seasons, rise and fall of prices, expenses of cultivation, including the cost of seed. In short, the average crop, and not the fullest crop that the land can produce, must be taken as the standard, and deductions made for expenses. We remand the case to the Judge to determine what amount of rent was realized by the special appellant from the ryots, if, as he says, the whole of the lands were in the occupancy of the ryots. If this be not the case, the debtor should be required to prove by the books what were the amount of profits he realized; and, should he fail to make out a satisfactory case, the Judge can then fall back on the third method of calculation, *viz.*, the capabilities of the soil in an average season, making the deductions intimated in our remarks above.

RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

The 24th April 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Murder—Evidence—Reference to Government for pardon.

Queen *versus* Gobindo Bagdee.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Hooghly, on a charge of Murder.

Discussion as to the sufficiency of the evidence in a case of murder, and the necessity of applying to Government for a pardon on behalf of the prisoner.

Mr. Justice Jackson.—I DIFFER from the Sessions Judge in the view which he takes of the evidence. I think that that evidence, if true, is quite sufficient to prove that the prisoner Gobindo Bagdee killed Poresh Bagdinee, and I do not doubt its truth, but consider that the Jury were right to convict upon it. The witness Petumber Bagdee proves that a quarrel took place between Poresh and the prisoner, who kept Poresh as his mistress; and the words which then passed evince that the feeling of jealousy was aroused in Gobind.

The witness Ramjee proves that, very shortly after, he saw Poresh lying on the ground close to the spot where the former witness had left her with the prisoner, and that Poresh was then groaning. This witness at once told Poresh's mother, Taramonee, who went to the spot, and found Poresh lying dead, and found the prisoner holding the body, and the prisoner then begged Taramonee not to inform against him, and that he would support her for the rest of her life. Another witness, Itchamohi, accompanied Taramonee, and saw Poresh lying on the ground and the prisoner there, and heard what passed between the prisoner and Taramonee. The latter witness then went away to give information to the gomashtah and the chowkeedar.

This evidence is sufficient to convict the prisoner with the death of Poresh, unless he can explain it away. He denies that he was present at the time and place alleged, and calls two witnesses to prove that he was at the time working with them in the fields. Before the Magistrate these witnesses supported the prosecution, and deposed that, though Gobind had been working with them, he had left them, at the very time the other witnesses say he was with Poresh. Before the Sessions Judge the prisoner would not have them examined. I think, however, that the Sessions Judge should have examined them for the prosecution.

Taramonee's evidence distinctly proves that Poresh was dead when she saw Poresh, and that the prisoner admitted it; and her evidence is strongly corroborated by that of Itchamohi. The police have failed to discover the body, it is true; but the evidence is still further corroborated by the disappearance of Poresh. The Judge thinks it improbable that Taramonee should not have gone to the nearest village and aroused the neighbours, but to one a little farther off. Had the Judge examined Taramonee as to the reason of her doing this, it is quite possible that she might have explained it. If the prisoner came from that nearer village, that might have been a good reason. Then the Judge thinks it improbable that the witness Ramjee should have gone away, as he states, and not aroused the villagers, and that the witness Itchamohi should not have done the same; and that the prisoner should have attempted to bribe Taramonee only, and not Itchamohi. But in this country people will not interfere in *such* a case more than they think actually necessary. Ramjee did go at once and tell Taramonee, Poresh's nearest relation; and it is very reasonable that, having done so, neither he nor Itchamohi would act any further, but leave the matter in Taramonee's hands. There is some discrepancy between Taramonee's depositions to the Magistrate and the Sessions Judge in one point. Before the Magistrate she said that Gobind took her to his house before she went to look for the chowkeedar; and before the Sessions Judge she omits this. But no question was asked regarding it. Again, it is a curious fact that, not finding the chowkeedar and gomashtah, she did not arouse the villagers that same day, but sat quiet until the next day. But people in this country are very apathetic in such matters; and, finding that the body of Poresh had disappeared while she was gone

to call the police, it is quite possible that Taramonee may have hesitated what to do next. But this does not make me disbelieve her evidence.

I see no sufficient grounds for any reference to the Government. Indeed, I would have convicted the prisoner myself on the evidence in the case.

Mr. Justice Glover.—I do not go quite so far as my learned colleague, but I agree with him that this is not such a case as we are bound to refer to Government under Section 54 of the Code of Criminal Procedure.

Supposing the evidence true, there was sufficient proof of the death of the woman Poresh. The witness Taramonee swore that she was dead. Itchamohi, in the Deputy Magistrate's Court, did the same; and although she did not depose positively to the fact before the Sessions Judge, she stated that Poresh was lying motionless, with eyes shut, and mouth open. No questions seem to have been asked her on this point; but, taking her deposition in connection with the positive evidence of Taramonee, and with the statement of the witness Ramjee, who first discovered Poresh lying in the sugar-cane field groaning, I think there arises a strong presumption that Poresh is dead, and that the Jury were not wrong in acting upon that presumption.

The connection of the prisoner with the crime was supported by the evidence of the two women; and, if the Jury believed that evidence, they were, I consider, right in convicting. It cannot be said that, either in this point or on the one alluded to, they found their verdict contrary to the evidence.

There remains the question whether that evidence was so manifestly weak and insufficient as to justify this Court in applying to Government for a pardon to the prisoner convicted on it. I agree with Mr. Justice Jackson that there is no such insufficiency. The evidence is not *per se* incredible or even improbable; and, although, had I been the Judge trying the case, I might have given the prisoner the benefit of a doubt, I cannot say that I am in any way assured of his innocence, or that the Jury were not justified in believing the evidence against him.

The 17th February 1865.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* F. B. Kemp, and F. A. Glover, *Judges.*

Theft (Definition of).

Queen *versus* Madaree Chowkeedar.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of "Theft."

Ruling as to what constitutes theft as defined in the Penal Code.

Mr. Justice Glover.—That the chowkeedar Madaree, who is the landlord of the woman Dhojoo, took from her three cows, and gave them to her creditors, is clearly proved. It is not so clear whether the creditors retained the animals. They assert that they refused to take the cows, and that Madaree had them still in his possession. Anyhow, there is independent and reliable evidence to prove that Madaree took them from Dhojoo against her will.

The question is, is such a taking "Theft"? Theft is defined (Sec. 378 of the Penal Code) to be "a *dishonest* taking of any moveable property out of the possession of any person without that person's consent."

"Dishonest" is, by Section 24, the doing anything with the intention of causing "wrongful" loss to a person, and by Section 23 "wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.

Now, all these conditions seem to be fulfilled in the present case. There can be no doubt that the woman Dhojoo suffered "wrongful loss" of the three cows, and as little that Madaree, in taking them from her for the benefit of her creditors, caused and intended to cause that wrongful loss, and, therefore, in the words of the Code, acted "dishonestly."

The Sessions Judge considers that an illegal taking is not theft, unless it be done "*animo furandi*" and "*lucri causâ;*" but this is not absolutely necessary, as appears from a case cited in Roscoe's "Criminal Evidence," p. 585, where a prisoner, who took a horse out of a stable, and afterwards backed him down a coal-pit, was convicted of "larceny," a conviction upheld by a majority of the Judges.

In the present case, the intention of Madaree to deprive Dhojoo of her property is established; and it makes no difference in the

former's guilt that the act was not intended to procure any personal benefit to himself.

The illustration put forward by the Sessions Judge to support his theory is not a happy one. No doubt, such a taking would not be theft, inasmuch as the rupee never reached the owner, *i. e.*, the durzee, and could not, therefore, be stolen from him. If the gentleman had paid the tailor his full wages, and if he afterwards forcibly took a rupee back, to which he himself made no claim, and gave it to one of the durzee's creditors, such taking would, in the words of the Penal Code, be a "dishonest" taking, causing "wrongful" loss to the durzee, and therefore theft.

I quite admit the distinction between this and an ordinary case of theft; but, looking to the words of the Law, I have no alternative, and must declare Madaree to have been guilty of theft, and his conviction by the Joint Magistrate to have been a proper conviction.

As, however, the point is a novel one, I should like the case to be laid before the Court generally for an authoritative ruling.

Mr. Justice Kemp.—A difference of opinion as to what constitutes the offence of theft, as defined in the Indian Penal Code, has caused this reference.

The facts of the case are briefly as follow:—Dhojoo, a poor widow, lived in the same homestead (though in a separate hut) with her landlord, Madaree, chowkeedar. Dhojoo appears to have owed small sums of money to the villagers. They complained to the chowkeedar, who, instead of directing the creditors to enforce their claims in a legal manner, took the law into his own hands, and seized the cows and other chattels belonging to the poor woman forcibly, and against her consent, and divided her property amongst her creditors. She brought a charge of theft against the chowkeedar under Section 378 of the Penal Code, and the Joint Magistrate of Rajshahye, Mr. Wingfield, convicted the prisoner Madaree chowkeedar of theft, and sentenced him to two months' rigorous imprisonment, and to a fine of 25 rupees realizable by distraint; the fine, if recovered, to be awarded to the prosecutrix after one month. As the decision of the Joint Magistrate is a short one, I give it "*in extenso*:"—

"I convict the prisoner of the charge. "It is proved by the evidence of both sides "that three alleged creditors of prosecutrix "complained against her to the defendant as "her zemindar, and that he summarily settled "the dispute by seizing 3 cows, value 9 or 10 "rupees, and handed them over to the cre- "ditors—that he also sold her house to "satisfy certain claims of his own against "her.

"This act was certainly done dishonestly, "*i. e.*, so as to cause wrongful loss (*see* Penal "Code, Sections 24 and 23), as it was loss "caused by 'unlawful means' of property to "which plaintiff was legally entitled to."

On appeal, the Sessions Judge of Rajshahye, Mr. C. S. Belli, reversed this decision, holding that the offence was not theft, as the chowkeedar acted openly, and not for his own profit and without any "*animus furandi*."

The question that has been submitted for our consideration is, whether the offence committed by the chowkeedar Madaree amounts to theft, as described in Section 378 of the Indian Penal Code, or not?

That Section runs thus—"Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft."

Now, it is clear that the intention is the gist of the offence. There must be an intention to take "dishonestly."

The law explains how I am to construe the term "dishonestly" (see Section 24 of the Code)—whoever does anything with the intention of causing wrongful *loss* to another person is said to do that thing dishonestly; "wrongful loss" is explained in Section 23 to be the loss by unlawful means of property to which the person losing it is legally entitled.

There is reliable evidence that the cows belonged to the woman; that they were in her possession; that the taking was against her consent; that it caused her wrongful loss; that the means used to deprive her of property to which she was legally entitled were unlawful; and therefore the taking was clearly "dishonest" in the meaning of that term as laid down in the Code. The learned Commentators, at page 328 of their edition of the Code, state—"It is the intention of the taker which must determine whether the taking or moving of a thing is theft. The intention to take dishonestly exists when the taker intends to cause 'wrongful gain to one person or wrongful loss to another person.'" It must, I think, be admitted that, in the present instance, the chowkeedar, if a man's acts are any guide to his intention, intended to cause

wrongful loss to the prosecutrix. Finding, therefore, all the main elements, which make up the offence of theft as defined in Section 378 of the Indian Penal Code, to exist in this case, it is my duty to apply the law as I find it, and not to put my own construction upon it. In this view I hold that the offence committed by Madaree chowkeedar was "theft."

It may be said that the chowkeedar thought he was doing rough justice; but I have nothing to do with that; my duty is to read the law as it stands.

I concur with my learned colleague, and desire that the case may be laid before a Full Bench of this Court.

The Chief Justice.—I concur with the two learned Judges of this Court that the case is one of theft in point of law. Could it be said that a servant would not be guilty of theft if he were to deliver over his master's plate to a pressing tailor, and tell him to pay himself?

The Judge was quite wrong in his remarks upon the Magistrate's memorandum of the prosecutrix's deposition in which she is said to say: "Defendant came and abused me, and took 3 cows out of my 8."

The Judge says: "What the figure 8 means, it is quite impossible for me to guess," &c. The meaning is very clear that defendant took three cows out of the prosecutrix's eight cows.

She says in another part of her deposition, "I saved only five cows."

I think the proper course will be to reverse the Judge's reversal of the Joint Magistrate's decision under Section 404 of the Code of Criminal Procedure, and order the Judge to cause the prisoner to be re-taken and to re-hear the appeal, and afterwards to transmit the record of the proceedings to this Court. As the prisoner has not had an opportunity of urging the case before the Court, the Court may intimate that, if the decision of the Magistrate be upheld by the Judge, the question of law will be submitted to a Full Bench, and the prisoner may have an opportunity of being heard either by himself or his vakeel. If the learned Judges agree with me, this order may be passed as suggested.

Mr. Justice Kemp.—I concur.

Mr. Justice Glover.—I concur.

The 25th April 1865.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Re-trial in the absence of the accused, a mere nullity—Power of High Court to order re-apprehension of the accused—Duty of Sessions Judge to obey.

Queen *versus* Madaree Chowkeedar.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of Theft.

The Sessions Judge, on appeal, without trying the merits of the case, reversed the Magistrate's conviction in a case of theft upon a point of law, reading the Penal Code by the light of his knowledge of the English Law. The High Court reversed the Sessions Judge's reversal of the Magistrate's conviction upon the ground that his decision was wrong in point of law, and directed him to re-apprehend the accused, and re-hear the appeal on the merits. The Sessions Judge thought that the High Court had no power to order the re-apprehension of the accused, and, proceeding to re-hear the appeal in the absence of the accused, acquitted him. HELD that the re-trial in the absence of the accused was a nullity; that, if the accused had been convicted instead of being acquitted, the case would have had to be re-tried; but that, as the Sessions Judge had declared his opinion that the evidence did not make out a case of guilt, it would be merely vexatious to the accused to order the re-trial of the case in his presence; that the High Court not only had the power to order the re-apprehension of the accused, but was quite justified in making the order; and that the Sessions Judge was bound to obey the order, and was highly censurable for his disobedience, and for the course which he thought proper to adopt.

The Chief Justice.—The Sessions Judge has now acquitted the prisoner upon the facts. Nothing, therefore, remains to be done so far as the trial is concerned. The Sessions Judge was informed that, if the decision of the Magistrate should be upheld by him, the question of law would be submitted to a Full Bench, and the prisoner might have an opportunity of being heard either by himself or his vakeel. The Sessions Judge did not uphold the decision of the Magistrate, but acquitted the prisoner, and reversed the conviction; yet the prisoner was uselessly instructed to appear personally or by the pleader in the High Court, for want of proper attention on the part of the Sessions Judge to the orders of the Court. The accused has been informed that his attendance is not required.

The Sessions Judge appears to me to have set up his own opinion against that of the Chief Justice and two other Judges of the High Court, and in consequence to have no-

glected to carry out the orders of the Court. The prisoner had not been acquitted. He was convicted by the Magistrate of theft, and sentenced. The Sessions Judge, on appeal, without trying the case on the facts, reversed the decision upon a point of law, overthrowing the Penal Code, and holding, according to his own explanation in his letter of the 3rd February 1865, that, although the conduct of the chowkeedar might be said to have been dishonest according to Section 24 of the Code, it was not theft, because the act was not done *animo furandi* or *lucri causâ*, reading the Penal Code by the light of his knowledge of the English Law.

The High Court reversed the Sessions Judge's reversal of the Magistrate's conviction, upon the ground that his decision was wrong in point of law, and directed him to rehear the appeal, and form his own judgment upon the facts disclosed by the evidence.

It was unnecessary, of course, that the accused should have notice of the re-trial of the appeal; and the Sessions Judge, having discharged the accused when he reversed the Magistrate's conviction, was ordered to retake him, and to re-hear the appeal. The accused might have escaped, if notice had been given to him. The Sessions Judge, however, thought that the High Court had no power to order the re-apprehension of the accused, and, acting upon his own opinion in preference to that of the High Court, proceeded, as I understand, to re-hear the appeal in the absence of the accused. I say nothing as to the Sessions Judge's decision upon the facts, for that was a matter upon which he was justified in acting upon his own view of the evidence. But he was highly censurable for disobeying the orders of the Court in not causing the accused to be re-taken as he was directed, or not having him present in Court during the re-trial.

If he had convicted the accused in his absence instead of acquitting him, the case would have had to be re-tried. As it is, the re-trial was a nullity. But, as the Sessions Judge has declared his opinion that the evidence does not make out a case of guilt, it would be merely vexatious to the accused to insist upon the Sessions Judge's obeying the order of the Court, and re-trying the case in the presence of the accused.

It is unnecessary to argue the case with the Sessions Judge. All that I think it necessary to say is, that I am of opinion that the Court had the power to make the order, that they were right in making it, and that the Sessions Judge was bound to obey it, and is highly censurable for his disobedience, and for the course which he thought proper to adopt.

I think the Sessions Judge should be asked whether, having reference to the opinion expressed in paras. 3 and 4 of his letter of the 3rd February 1865, and his subsequent examination of the evidence, &c., the appellant is, in his opinion, fit to be retained in an office which gives him so many opportunities of oppression and violation of law.

Mr. Justice Glover.—I entirely concur with the learned Chief Justice in thinking that the High Court had the power to make the order in question, and that that order was a proper one.

The accused was not, at the first hearing of the appeal by the Sessions Judge, acquitted, in any sense of the term, of the theft. He was absolved from punishment, because in the Sessions Judge's opinion the facts stated in the evidence against him did not sustain a charge of theft. Into the sufficiency or otherwise of that evidence to prove any offence, the Sessions Judge did not enter; and, therefore, I repeat, that his first proceeding was not an acquittal of the prisoner on a charge of theft, but a cancelment of the Magistrate's order on the ground that, whatever other offence the chowkeedar might have been guilty of, it was not "theft;" and, as this Court held the Sessions Judge to be wrong in law, and his definition of theft to be not a proper definition, it follows that the second hearing, which the Sessions Judge now asserts to be a fresh trial for an offence of which the prisoner had been once acquitted, was, in reality, the only trial in appeal the accused ever had on the charge of theft.

As the Sessions Judge has acquitted the accused on the evidence, we can do nothing more. It would be useless for me to point out in what I consider that the Sessions Judge has erred in detailing that evidence. The accused has now, at all events, been acquitted, and cannot be tried again, however strong the evidence against him.

For the rest, I think that the Sessions Judge should have deferred to the direction issued by this Court, and that his conduct in neglecting to do so is open to objection.

The 1st May 1865.

Present :

The Hon'ble G. Campbell and E. Jackson, *Judges.*

Assessors (Opinion of, to be recorded).

Queen *versus* Musst. Mina Nuggerbhatain and Musst. Luchen.

Committed by the Magistrate, and tried by the Sessions Judge of Behar, on a charge of house-breaking, with intent to commit theft.

The grounds of each Assessor's opinion should be distinctly recorded by the Judge.

Mr. Justice Campbell.—THIS is a case which it is very difficult to deal with. According to the judgment of the Sessions Judge, there would not seem to be two sides of the case. He makes it perfectly clear and simple. Yet, at the end, we find that both Assessors were for acquittal on the first charge, and one of them for acquittal on the other charge also. Not the least clue is given to us of the grounds on which the Assessors came to this conclusion. The prisoners seem to have been poor beggar women, and the Assessors could hardly have had any prejudice in their favor. It seems to me that it is too much the custom to neglect the opinion of the Assessors, and put them in such a shape that this Court can make nothing of them. There is all the difference between the verdict of a Jury and the opinion of the Assessors. The former is a simple and conclusive verdict of guilty or not guilty. The other is not a verdict, but an *opinion*, and, not having any legal validity, its weight seems to depend solely on the reason and sense by which it is supported. It appears, therefore, to me that, in recording in writing the opinion of each Assessor as required by Section 324 of the Code of Criminal Procedure, the Sessions Judge should not merely put in his judgment that he concurs with or differs from the Assessors, but should separately record an opinion of each Assessor, and should invite and encourage each Assessor to make that opinion more than a bare expression for or against the prisoner, but an opinion on the case, stating the view that the Assessor takes of the facts and the considerations (in brief) on which his opinion is founded. In this case I do not think that the case can be disposed of with any regard to justice, without some more distinct record of the opinion of the Assessors; and I would remand the case to record more distinctly, in the manner suggested above, the opinion of each Assessor, and then re-submit it. I understand that the omission to record any proper opinion of the Assessor is so common that this should (if the second Judge concurs) be laid before the Judge of the English Department for more general instructions.

Mr. Justice Jackson.—I quite agree with Mr. Justice Campbell's remarks on this case. The Sessions Judge should, when sitting with Assessors, and certainly when he finds their judgment differs from his own, call upon them to give the grounds upon which their judgment is arrived at. The law contemplates that Assessors should give their opinion on the case, while Juries are to be asked only for their verdict.

It appears to me, however, premature to call upon another Judge in this case to record his opinion on the prisoner's appeal. Mr. Justice Campbell, as I understand, has recorded no opinion as yet with respect to the prisoner's guilt or innocence, but wishes that an important omission, made by the Sessions Judge, should be rectified ; and for that purpose the papers of the case should be returned to the Sessions Judge. I quite agree in the propriety of that order.

The 3rd May 1865.

Present:

The Hon'ble G. Campbell, E. Jackson, and F. A. Glover, *Judges.*

False evidence—Compulsory statement to Police.

Queen *versus* Nagena Ourut.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of false evidence.

Discussion as to the propriety of a conviction on a charge of false evidence, one of the statements charged being been made to the police under compulsion.

Mr. Justice Campbell.—I entirely concur with the Assessors in thinking that the prisoner is entitled to an acquittal on the second charge. There is abundant evidence to the prisoner's innocence, but not a tittle of legal evidence to her guilt. There is, on the one hand, some evidence to prove that her deposition before the Magistrate was true ; and, on the other, evidence to prove that she gave it under compulsion; either of which would go to establish her innocence. In fact, it is beyond doubt that on that occasion she either spoke truly or spoke from compulsion. To suppose that under the circumstances she voluntarily gave false evidence against

her son, is contrary to reason and human nature. The only evidence against her on this charge is the subsequent deposition before the Judge; and it appears to me that (as held on previous occasions) that deposition is by law inadmissible under the terms of Act II. of 1855, Section 32, as evidence against the witness in a criminal proceeding. Upon these two grounds—

First.—That the prosecutor has offered no legal evidence whatsoever on that charge.

Second.—That the prisoner is innocent of that offence—

I think that she should be acquitted and absolved on this second charge. In fact, the Judge seems to have no doubt whatever of her innocence, and seems merely to resort to the alternative finding as a device to get over his doubts on the first charge.

I think that the case should be remanded in order that the Judge, striking out the *2nd* charge, may record a clear finding on the *1st* charge, and submit the record to this Court for final disposal.

P. S.—I should mention another important consideration. Supposing evidence to have been offered on either charge and an alternative finding legally arrived at, it is quite clear that, in the spirit of Section 72, as well as in equity, the prisoner should be punished as for the less heinous of the two alternative offences of one or either of which she is found guilty. In this case it rather seems that the Judge in his alternative finding has punished with the most extreme severity of the law as for the major offence. Taking the alternative most favorable to the prisoner that she was induced to give false evidence before the Magistrate, but retracted and told the truth to the Judge, would 7 years' rigorous imprisonment be a reasonable punishment? I think not; I would have reduced it to 3 months or 6 months at most. It is in every way clear to me that, in the form of an alternative finding, the prisoner is really punished as for giving false evidence before the Judge without being convicted by the Judge of that offence, and that she should be fairly convicted or acquitted on that charge.

Mr. Justice Jackson.—I do not think that anything will be gained by a remand of this case. The Sessions Judge admits that there is no evidence to prove how the murder of Modhoo did take place. Before the Magistrate the prisoner at *first* deposed that she knew nothing about the manner in which Modhoo came by her death; that Modhoo went out at night, and did not return, and her dead body was afterwards found in a tank. The Magistrate then asked her what she said before the Police, and h reply was that she had said that her son ...d told Modhoo not to smoke, because there were other persons present; and her son then took her by the chin, and Modhoo fell down and expired, and that her dead body was then thrown into the tank. The Magistrate then asked her which story was true, and she replied that the latter was true, and that the first was told to save her son from punishment.

Before the Sessions Judge the prisoner again repeated the first statement which she had made before the Magistrate, and alleged that her statement as made before the Police had been elicited by bad treatment.

The Sessions Judge disbelieves the evidence to bad treatment. But I must say that, whether she was ill-treated or not, the story that she saw her son take Modhoo by the chin, and that Modhoo thereupon fell down and expired, is an evident falsehood, and there is every probability that such a story was made up by the Police, or made up by the prisoner through fear of the Police. The Magistrate does not examine the prisoner, or ask for any further details of what occurred, but is satisfied with her mere statement that the above impossible story is a true story.

My impression is, that the deposition which the prisoner really gave to the Magistrate in the *first* instance, and to the Sessions Judge afterwards, is the truth. At least it is, in the absence of all evidence, more like truth than the story of Modhoo being taken by the chin, and then and there expiring; and I think the prisoner is to be much commended instead of being punished for not continuing to repeat so false a statement. I would acquit the prisoner.

Mr. Justice Glover.—I concur with Mr. Justice Jackson that this prisoner should be at once acquitted, though not exactly for the same reasons.

I would not go to the length of saying which story was true, and which false; but I consider it proved (by evidence that is to all appearance circumstantial and true, and which, at all events, has in no way been rebutted) that the prisoner was coerced by the Police; that she received at least one kick, and was threatened with worse treatment; and that whatever she may have stated to the Joint Magistrate must be considered altogether null, and as if it had not been said, the statement being made after bad treat-

ment, and under the influence of threats. I observe that the Inspector, who is stated by the witness to have ill-treated the prisoner, was in Court for at least part of the time when her statement was being recorded by the Joint Magistrate; this was improper. If, then, the prisoner's statement to the Joint Magistrate be set aside as inadmissible, on the ground of its having been made under improper influence, there is no charge left, and no evidence to prove that her second statement to the Sessions Judge was not perfectly true.

The conviction depends on the two contradictory statements; and, if one of these be expunged from the record, no proof against the prisoner remains.

I would, therefore, acquit her; but I think it right to remark that, had the conviction been sustainable, the very severe punishment inflicted, no less than 7 years' rigorous imprisonment, was altogether uncalled for.

The 4th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Approver's Evidence—Corroboration.

Queen *versus* Issen Mundle and others.

Committed by the Officiating Magistrate of Furreedpore, and tried by the Sessions Judge of Dacca, on a charge of dacoity, &c.

An approver's uncorroborated evidence is not sufficient as proof against other persons.

Mr. Justice Glover.—The circumstances of this case have been fully detailed by the Sessions Judge.

The conviction depends mainly on the evidence of Bungsee, an accomplice in the dacoity, who has been allowed to turn Queen's evidence.

With regard to the prisoners, against whom this man's evidence is the sole legal proof, I do not think it safe to convict. The temptation to an approver witness to make out a good story, and earn his pardon, is very apt to produce evidence against many who had no concern in the crime to which he testifies; and, unless such evidence were corroborated in some way, I should decline to convict upon it. Very strong corroborative proof need not be required; but some is, in my judgment, absolutely necessary.

Taking this view, I would acquit the prisoners Barra Kodai, Nuddear, Kaleechurn, and Dinonath, there being no legal evidence against them beyond the statement of the approver Bungsee.

I would not interfere with the other sentences. Against the prisoner Huree Shobea is the evidence of the prosecutor's witness Anund Chunder, who swears to him as one of the men who plundered the boat, corroborated by the evidence of the approver, and by the wounded state of Huree himself.

In the case of Huree Madhub, Bungsee's evidence is supplemented by the prisoner's own confession before the Magistrate.

In that of Madhoo, the finding of certain articles of the stolen property (identified by the prosecution witnesses) in his house corroborates the approver Bungsee's statement, and is sufficient to convict this prisoner.

In the case of Issen, the approver's evidence is corroborated by the finding of part of the stolen property in his possession; whilst in that of Fukeer Chand, the whole circumstances are so strongly against him, that they, with the evidence above mentioned, render his conviction justifiable, although he did not confess to the Magistrate, as the Sessions Judge appears to suppose.

With reference to the prisoners whom I propose to acquit, the case must go before a second Judge.

Mr. Justice Jackson.—I concur with Mr. Justice Glover that the recorded evidence is not sufficient to prove the guilt of the prisoners Barra Kodai, Nuddear Chand, Kaleechurn, and Dinonath. The Judge seems to have considered the evidence of the approver witness, corroborated as it was by the finding of certain property hid in a dry river, sufficient evidence. But this, though good corroboration of the approver being one of the dacoits, is no corroboration as against the prisoners; and uncorroborated approver's evidence cannot be admitted as proof against other persons.

The 5th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Insanity—Murder.

Queen *versus* Musst. Poochee.

Committed by the Deputy Commissioner of Kamroop, and tried by the Judicial Commissioner of Assam, on a charge of murder.

Discussion as to insanity in the case of a person charged with murder.

Mr. Justice Glover.—THE report called for in this Court's resolution of the 26th January last has now been submitted, and by it at least one point has been thoroughly cleared up: that the woman Poochee is not pregnant, and that her statement to the Medical Officer, in the first instance, was consequently false.

As to her being 'insane,' the evidence of the Civil Surgeon appears to me altogether inconsistent and unsatisfactory. He admits that Poochee is competent to manage the affairs of every-day life, and to be capable of understanding the difference between right and wrong in matters of comparatively trivial importance, although he thinks her incapable of properly understanding that "murder" is a heinous crime. It is not for the Court to argue the question, but Dr. Clark's views appear to be opposed to those of Medical Officers who have made the subject of insanity their peculiar study.

Under the circumstances, however, and bearing in mind the long time that has elapsed since the woman was sentenced, I would commute the capital sentence to one of transportation for life.

Mr. Justice Jackson.—I concur with Mr. Justice Glover that, under all the circumstances of the case, the prisoner Poochee should be sentenced to transportation for life.

The 9th May 1865.

Present:

The Hon'ble F. A. Glover, *Judge.*

Abduction.

Queen *versus* Modhoo Paul.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of abduction, &c.

The abduction of a minor girl, under 16 years of age, out of the custody of her lawful guardian, is punishable under Section 361 of the Penal Code. It is not necessary to such a conviction that the abduction was forcible.

THIS appears to be a very clear case. It is well proved that the prisoner carried off the child Aladee, aged about five years, from the house of her father, whilst that father was absent, and when the mother, Musst. Radhamonee, was the child's lawful guardian. It is proved also, although that is not necessary to this conviction, that the carrying off was forcible.

The prisoner does not deny having possession of the child, or of marrying her almost immediately afterwards to a third party, but urges that all that he did was with the consent of the child's father (his own brother) to whom he paid the greater portion of the marriage dowry.

This is simple assertion, and even the prisoner's witnesses deny the statement altogether.

There can be no doubt that the prisoner took a minor girl, under 16 years of age, out of the custody of her lawful guardian, and is, therefore, punishable under Section 361 of the Penal Code.

I reject the appeal.

The 9th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Disputes regarding possession of land, &c.

Queen *versus* Seetanath Roy.

Before passing an order in a case of disputed possession of land, &c., the procedure enjoined by Section 316 of the Code of Criminal Procedure should be carried out.

THERE appears to have been a dispute between Tarasoondoree Bremoneea, and her son Seetanath Roy, regarding the possession of a Cutchery Baree. The Police, apprehending a breach of the peace, went to the spot, and the matter ended by several persons on both sides being charged with the offence of Unlawful Assembly. The Magistrate acquitted them, but he at the same time directed that one of the two disputing parties, who, he thought, was proved by the evidence to have been in previous possession, should be re-placed in possession of the Cutchery by the Police, and retained in possession.

This order is now complained of before us as illegal. The order in question could only have been passed under Section 319 of the Procedure Code, and, before passing such an order, the Procedure enjoined by that Section should be carried out. But it is evident that no proceeding has been recorded: no notice has been served on the parties, and therefore the order passed is illegal.

It is set aside, and the Magistrate is directed to proceed according to law.

The 6th May 1865.

Present:

The Hon'ble F. A. Glover, *Judge.*

Dacoity—Presumption of participation in.

Queen *versus* Cassy Mul and Sree Churn Mul.

Committed by the Deputy Magistrate of Bancoorah, and tried by the Sessions Judge of West Burdwan, on a charge of dacoity, &c.

When persons are found, within six hours of the commission of a dacoity, with portions of the plundered property in their possession, the presumption of law is, that they are participators in the dacoity, and not merely receivers.

THE prisoners in this case were arrested by a chowkeedar very early in the morning as he was going his rounds on suspicion. He desired them to go with him to the thannah, and finally, with the assistance of the two other ghatwals, compelled them to go there, refusing money and ornaments as bribes to let them go.

On their arrival at the thannah, various ornaments and other things were found on their persons, which the prosecutor afterwards came forward and identified as part of the property stolen from him by a band of dacoits the night before their arrest.

The finding of these ornaments, &c., on the prisoners, and their identification as the property of the prosecutor, are points very clearly and satisfactorily proved by the evidence of several witnesses. The defence is altogether unsubstantiated, and out of a dozen witnesses not one is able to say a word in favor of either prisoner.

I dismiss the appeal therefore; but the conviction ought to have been as desired by the Assessors in the first Court. When persons are found within six hours of the commission of a dacoity with portions of the plundered property in their possession, the presumption of law is, that they were participators in the dacoity, and not merely receivers.

The 11th May 1865.

Present:

The Hon'ble F. A. Glover, *Judge.*

Illegal gratification (to influence the doing of official acts).

Queen *versus* Kaleechurn Serishtadar.

Committed by the Magistrate, and tried by the Sessions Judge of Sarun, on a charge of taking bribes.

The taking of a gratification by a Serishtadar to influence a Principal Sudder Ameen in his decisions, is sufficient to a legal conviction, whether the Serishtadar did or did not influence or try to influence the Principal Sudder Ameen.

THE appellant has been convicted by the Magistrate and Sessions Judge of taking bribes under Section 161 of the Penal Code; and this Court is now prayed to exercise the power given to it by Section 404 of the Code of Criminal Procedure, and to call for the record.

With the strength or weakness of the evidence on which the prisoner has been convicted by the Lower Courts, I have nothing to do; the only question is, whether there has been, in their proceedings, any error of law which calls for this Court's interference.

Mr. Allen, for the appellant, contends that his client has been convicted under Section 161 of "doing an official act," whereas it has been amply proved, by the sworn deposition of the Principal Sudder Ameen himself, that the prisoner never influenced, or attempted to influence, him in any way regarding his official acts. But on this I observe, in the first place, that the prisoner has been convicted of receiving illegal remuneration for doing "official acts," which had no connection whatever with his immediate superior, the Principal Sudder Ameen, such as receiving small sums for the filing of vakalutnamahs, petitions, &c.

But, had the conviction been solely for receiving illegal gratifications for influencing the Principal Sudder Ameen's decisions, it would have held good, whether the actual influence were exercised or not. The latter part of the explanation of Section 161 expressly mentions that "a person who "receives a gratification as a motive for doing "what he does not intend to do, or as a re-

" ward for what he has not done," is equally liable. And Illustration C explains that a person who induces another erroneously to believe that he has influence, &c., is punishable under the Section.

So that it would be immaterial whether the appellant in this case did or did not influence, or try to influence, the Principal Sudder Ameen. It would be sufficient to a legal conviction that he took a gratification for that avowed purpose, and the words of the Section, as explained by the Commentary and Illustration, include both doing and pretending to do.

It is objected, further, that there is no proof that the appellant either did influence, or intended to influence, the Principal Sudder Ameen as *Serishtadar*. But, granting this, it is quite clear that those who paid him did so, not in his individual capacity, but as one holding an office which gave him access to the Presiding Judge; and that they were induced to do so in the hope that his influence, as Serishtadar, would be exercised on their behalf.

It appears to me, therefore, that, on the appellant's pleader's own showing, there is no legal ground for appeal in this case, and that there is no necessity for sending for the record.

The 11th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Murder.

Queen *versus* Peter Ram Thappa.

Committed by the Assistant Commissioner of Cherrapoonjee, and tried by the Sessions Judge of Sylhet, on a charge of murder.

Case of conviction of murder on the confession of the accused, together with evidence as to his conduct both before and after the murder.

Mr. Justice Glover.—The Court's final order in this case has now been delayed for nearly five months, in consequence of the absence of the two European witnesses, whose evidence this Court wished to have recorded.

There appears from the Sessions Judge's statement to be no immediate prospect of these witnesses' return to Sylhet or Cherrapoonjee; and, as the prisoner has been so long under sentence, I think the case should be disposed of at once on the evidence as it stands.

The circumstances have already been detailed. Against the prisoner are the proved facts, that he and the deceased (either his wife or his mistress, the witnesses speak of both terms indifferently) had, for some time past, lived on bad terms; that he had ill-treated her on various occasions; and that she had at last been obliged to flee for refuge to the house of witness No. 1; that he had been turned out of cantonments in consequence of his violent behaviour, and that he had openly threatened to kill both his wife and her temporary paramour. It is proved, moreover, that, on the night of the murder, there was a light in the prisoner's house; and that shortly before he had been seen hanging about the cantonment.

The deceased was found lying, with her throat cut, and quite dead, in front of her paramour's house. On that witness's return from fetching water, suspicion immediately attached to the prisoner, and a party of sipahees was sent to search for and apprehend him. They proceeded as far as Myrung, where, after some trouble, they found the prisoner concealed in a stable. On being brought before the European gentlemen, who chanced to be stopping at the Myrung dâk bungalow at the time, he admitted at once freely and fully that he had murdered his wife out of revenge for her having deserted him.

This confession might not have been *per se* sufficient evidence against the prisoner, even if the gentleman before whom it was made had been present at the trial; but that it was made, and at the time, and under the circumstances stated, is admitted by the prisoner himself in his statement to the Assistant Magistrate. His excuse was, that he was drunk at the time, and did not know what he was saying: a plea completely disproved by the evidence of the sipahees who depose that the prisoner was perfectly sober at the time he made his confession.

Taking all the evidence together, I have no doubt of the prisoner's guilt, and would confirm the sentence of death passed on him by the Sessions Judge.

Mr. Justice Jackson.—The prisoner is charged with the murder of his wife. The parties lived in the Sylhet Cantonments. It is proved that his wife had been forced to leave his house by his ill-treatment of her,

and his threats of taking her life. She had in consequence gone to the house of another man, and was living with him. It is in evidence that he had been heard frequently to threaten to take the lives of both his wife and the man with whom she was living.

One night his wife was found with her throat cut. Suspicion falling on the prisoner, and he not being found at his usual haunts, Captain Ommanney, of the 44th N. I., sent a party of sepoys to search for the prisoner, on the road by which it might be expected that he would attempt to escape. These sepoys found the prisoner some miles from Sylhet trying to conceal himself in a stable. They seized him, and depose that they took him before Dr. Browne and Lieut. Nicholson who were at the bungalow close by, and before them the prisoner admitted that he had murdered his wife by cutting her throat. Before the Magistrate, the prisoner again admitted that he had told these gentlemen and the sepoys that he had murdered his wife; but he then said that he was drunk when he had made that statement. The sepoys, however, prove very clearly that he was not drunk, but sober. The case has been delayed to obtain the evidence of the two English gentlemen; but it appears that they had been ordered to the Bhootan Dooars on public duty, and no steps have been taken by the Sessions Judge to enforce their attendance as soon as their public duties would admit of it. In my opinion, the evidence of the witnesses, who were examined at the trial, is quite sufficient to prove, without a shadow of a doubt, that the prisoner did murder.

There is no reason to distrust the depositions of the sepoys, the more so as the prisoner has himself admitted that they have correctly deposed to what he said. The prisoner was heard to have constantly threatened to take his wife's life. He was seen in Sylhet the day before the murder, and admits to the Magistrate that he was there. He was found shortly after the murder evidently attempting to escape, and there seems to be reason to believe that, in order to effect his escape, he set his house on fire.

I consider the offence of culpable homicide amounting to murder clearly proved against the prisoner; and, seeing no reason for mitigation of punishment, would confirm the capital sentence passed on him.

The 12th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Right of private defence of property against thief, resulting in his death.

Queen *versus* Kurrim Bux.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Dinagepore, on a charge of culpable homicide not amounting to murder.

Case of exercise of right of private defence of property against a thief, who was seized in the act of committing a burglary in the house of the accused.

THE Sessions Judge has convicted the prisoner of culpable homicide not amounting to murder, and sentenced him to three years' simple imprisonment.

It appears that he seized a thief in the act of committing a burglary in his house, and that the thief was found, on the villagers assembling, to be dead. The prisoner says that he struck the thief one blow with a lathee; but the Sessions Judge and the Assessors disbelieved this, as the medical man who examined the body (as the Sessions Judge reports), deposed that death resulted from strangulation. We find, on looking at this report and deposition, that the thief's death was caused by suffocation; and there seems to be no doubt, from the evidence, that the act of the prisoner in seizing and holding the thief, whose face was downwards, as he was getting into the house, caused the suffocation. We are not satisfied that, in exercising his right of private defence of property against the thief, the prisoner exceeded the provision of the law, and we, therefore, acquit the prisoner, and direct his release.

The 15th May 1865.

Present:

The Hon'ble G. Campbell, E. Jackson, and F. A. Glover, *Judges.*

False charge of Dacoity (by woman).

Queen *versus* Nathoo Doss and others.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of instituting a false criminal proceeding on a false charge and giving false evidence.

Discussion as to the punishment sufficient for women charged with bringing a false charge of dacoity.

Mr. Justice Glover.—I HAVE gone ugh the evidence recorded in this case, see no reason to interfere with the co- ons. It is, I think, clearly proved that was no dacoity, and that the prisoners the false statements charged against —the prisoner Nathoo, with a view venge himself on those of the villagers were opposed to his continuance in the rship, and had just succeeded in ousting from it.

hink also that the sentence passed upon oo is, under the circumstances, not too e.

t I would reduce the punishment inflicted e two women. One is the wife, the the relative of Nathoo; and they were, tless, the former especially, very much his influence, and could scarcely be free agents.

ropose to sentence the wife to one year's us imprisonment, and Ojabu, the rela- o eighteen months. The Judge, I ob- has given her the highest sentence d by law, *viz.*, three years.

th respect to these two women the case be laid before another Judge.

. Justice Jackson.—I would not inter- ith the sentences passed upon these two n. They took leading parts in the e of which they have been committed, ringing a false charge of dacoity. The ent to the thanna, and gave the police st information of the false dacoity, and cond received some of the property from wners, and declared that the persons had been falsely charged with dacoity those things in her house. The e for their conduct is clearly proved. ld confirm the sentences passed, which ot, to my mind, appear heavy for the s offence of which the prisoners have guilty, and the part they took in it.

. Justice Campbell.—The offence is heinous, and in some such cases women bad or worse than men. But as in this the Sessions Judge who tried the case ctly records his opinion that the women under the influence of the male head e family, Nathoo, and considering the n in the consideration shown by English for wives committing offences under the nce and in presence of their husbands, nk that, upon the whole, the sentences sed by Mr. Justice Glover for the n are sufficient, and I would reduce accordingly.

The 15th May 1865.

Present:

The Hon'ble F. A. Glover, *Judge.*

Uttering Forgery—Contemporaneous Sentences.

Queen *versus* Mohesh Chunder Sircar.

Committed by the Magistrate, and tried by the Sessions Judge of Jessore, on a charge of Forgery, &c.

The offence of uttering forged documents requires in this country to be punished with the severest punishment allowed by Law.

Contemporaneous sentences are not justified by the Penal Code.

THAT the prisoner presented the two forged mooktearnamahs, there can, of course, be no question. He admits that he did so, and admits that the documents were forged; the question is, whether he knew the fact at the time of so presenting them.

I agree with the Sessions Judge that the presumption is against him. He supplemented the forged mooktearnamahs by a wilfully false statement, that he was acquainted with the witnesses who came in to attest the execution of the mooktearnamahs, and so induced the presiding officer to credit the documents themselves.

He has failed to prove that these mooktearnamahs were sent to him by the parties who are said to have executed them, or in any way to rebut the presumption of fraud, which the presenting of such documents, under the circumstances of this case, gives rise to.

I consider the evidence sufficient for conviction, but on the *second* count only.

There is no evidence at all to prove that the prisoner actually executed the forgeries, whilst there is very strong presumptive proof that he uttered them, knowing them to be forgeries. I would not interfere with the sentence of seven years' transportation which the Sessions Judge has passed. The offence would be a very grave one anywhere, but in this country it requires to be repressed with the severest punishment allowed by law.

But the Sessions Judge should be told that contemporaneous sentences are nowhere justified by the Penal Code; and that, if he considered the prisoner's guilt proved on both counts, he should either have apportioned the punishment between the two, or have inflicted the full amount under the first head of the charge, leaving the *second* unpunished.

The 15th May 1865.

Present:

The Hon'ble G. Campbell, *Judge.*

Trial by Jury—Foreigners.

Queen *versus* John Londley.

Committed by the Magistrate, and tried by the Officiating Additional Sessions Judge of Hooghly, on a charge of voluntarily causing grievous hurt.

Requirements of the law with regard to the trial by Jury of a stranger and a foreigner.

THE main gist of the prisoner's petition of appeal is, that he, a stranger and a foreigner, was tried by a Jury ignorant of his language and his ways, and had not a fair trial; in fact, he claims the privileges given by the law to persons so situated, and to which, as I have before observed, he has a right.

But I find it quite impossible to ascertain from the record whether the provisions of the law were complied with. I can find nothing but a Bengalee list of the names of the Jury, which no one can read intelligibly.

The prisoner is—*1st*, entitled, under Section 323, to be tried by a Jury, of which at least one-half are Europeans or Armenians.

2ndly.—Under Section 349, the Jury must be summoned and drawn in such a way that, while at least one-half must be of those classes (that is, the number being uneven, the majority), he may not improbably have more than the necessary majority of his own class, if, after the full number of that class has been drawn, those following happen to be drawn of that class from among the panel of equal numbers of either class prescribed by this Section.

3rdly.—Under Section 343, he has a right of challenge of each Juror, and must be asked if he has any objection to each, and if, as he says, they were all landsmen and persons unlikely to understand him, to the exclusion of all the Ship Captains and such like who could, it is possible that such an objection might have been allowed as likely to cause prejudice against him.

I must call on the Sessions Judge to certify whether all these requirements of the law were complied with, and how, if they ere. He will also be so good as to certify English the names of the special panel mmoned for this trial under Section 349, names of all the persons drawn by lot n the panel, the order in which they e drawn, the persons who we e challenge if any, and the decision pass d on each lenge, and the name, roll, an profession of each Juror by whom the prisoner was tried.

The 15th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Robbery.

Queen *versus* Ruhman Khan, Hosseinee Khan, and Jehan Khan.

Committed by the Deputy Magistrate of Nowadha, and tried by the Sessions Judge of Behar, on a charge of cheating and robbery, &c.

Discussion as to what constitutes robbery.

Mr. Justice Jackson.—I THINK that the Judge is wrong in this case to convict the prisoners of robbery.

It is true that the witness to the theft deposes that, when the witness followed the prisoners and began to cry out, one of them struck the witness with a stick, but this does not constitute the offence of robbery.

The prisoner, who struck the blow, did not, in the words of the law, in attempting to carry away property obtained by the theft, *for that end* strike the blow. I would alter the conviction from robbery to theft.

My impression, too, is, that the sentence is not commensurate with the nature of the offence committed. I would reduce it to two years' rigorous imprisonment against the prisoners Ruhman and Hosseinee, and confirm that of two years passed on Jehan Khan.

Mr. Justice Glover.—I concur with Mr. Justice Jackson in altering this conviction and sentence, but I do so on the ground that there is no proof of the assault with the *lattee.* One witness, the woman Anloja, states that, on her following the prisoners, begging for the restoration of her property, one of them struck her with a *lattee*, but the other says nothing at all about it; on the contrary, her evidence tends clearly to show that after the articles were snatched from the woman by the thieves, the latter went off at once, and that no further violence was attempted. Had there been any reliable proof of the blow, I should have considered the offence as robbery, as the violence would have been used to facilitate the carrying away of the property stolen.

But as the utmost proved against the prisoner is, that the property was snatched away from the owners, and as this did not cause "fear of present instant death or violence," the offence is reduced to theft only.

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The 15th May 1865.

Present:

The Hon'ble F. A. Glover, *Judge.*

Abduction of minor girl with intent to marry, &c.

Queen *versus* Koordan Sing and Mohun Sing.

Committed by the Assistant Commissioner, and tried by the Deputy Commissioner of Cachar, on a charge of abduction with intent to marry, &c.

The abduction of a girl under 16 years of age with intent to marry, &c., without the consent of her lawful guardian, is punishable under Sections 363 and 366 of the Penal Code. The consent of the kidnapped person is immaterial, nor is it necessary to show that the taking or enticing away was by force or fraud.

THAT the prisoner Koordan Sing carried off a girl, Shabah Saima, she being a minor under 16 years of age, to the house of the other prisoner Mohun Sing, is not denied by either.

The defence of Koordan is, that the girl came to him willingly, and that he had permission to take her, as well as assistance in doing so, from Khela Sing's wife. Mohun Sing denies that he knew that the girl had been kidnapped.

Now, the lawful guardian of the girl for the time being was Khela Sing, in whose house Shabah Saima was, with the permission of her parents, residing. It was without his consent that she was taken away, and the consent of the kidnapped person would be immaterial. Nor would it be necessary to show that the taking or enticing was carried out by means of force or fraud.

It seems to me that, from the prisoner's own admissions, he has been rightly convicted; and whether the girl ultimately consented to cohabit with him, as he says, or whether she, though solicited to do so, refused, as she herself says, he still comes under the provisions of Sections 363 and 366 of the Penal Code.

The other prisoner is shown by the evidence to have known that Shabah Saima was brought to his house without the consent of her parents or guardians, and to have aided in keeping her concealed.

But, taking all the circumstances of the case into consideration, the fact of the girl's living, notwithstanding her assertions to the contrary, apparently willingly cohabited with the prisoner Koordan, and remained without objection in his house, I think that a less severe sentence than that passed by the Deputy Commissioner will meet the requirements of justice.

I would commute the sentence of Koordan to two years, and that on Mohun Singh to nine months' rigorous imprisonment respectively.

The 15th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Death—Women (carrying).

Queen *versus* Tepoo.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Rungpore, on a charge of wilful murder.

A woman, being quick with child, is exempt from capital punishment.

THE prisoner confessed to the Joint Magistrate and to the Sessions Judge, and there cannot be the slightest doubt of her guilt.

The evidence shows that she had never been, nor was at the time, insane or irresponsible for her actions, and, under ordinary circumstances, we should have had no hesitation in confirming the sentence of death (to be carried out after delivery) passed on her by the Sessions Judge.

But the prisoner is quick with child, and such a state is always held to be a bar to eventual capital punishment. Following the usual precedents, therefore, we commute the sentence of death to that of transportation for life.

The 18th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

False Evidence (Punishment for)—Plea of guilty.

Queen *versus* Unnoo Patoonee and another.

Committed by the Assistant Commissioner, and tried by the Deputy Commissioner of Cachar, on a charge of false evidence.

What was held to be a sufficient punishment in a case of false evidence in which the prisoners pleaded guilty before the Sessions Court.

Mr. Justice Glover.—As both the prisoners pleaded guilty before the Sessions Court, the only question is about the sentence.

I think, under the circumstances, that five years' rigorous imprisonment is too severe a punishment. Not that I concur in the doctrine that a man pleading guilty to a charge of perjury before the Sessions Court is *entitled* to any diminution of his sentence; for that would, in my opinion, be holding out an inducement to unprincipled persons to take their chance of being found out when giving false evidence in a Court of first instance, on the assurance that, if they admitted their guilt at the Sessions, a "*locus pœnitentiæ*" would be afforded them, and they escape nearly scot-free.

But the record in this case does not disclose any thing particularly bad against either prisoner, and I think that the ends of justice will be amply satisfied by a sentence of three years' rigorous imprisonment instead of five.

The papers must go before another Judge.

Mr. Justice Jackson.—I concur in the mitigation of sentence proposed by my colleague. Three years' rigorous imprisonment will satisfy the ends of justice. The prisoners claim to be acquitted, because, although they at first denied their relationship, they afterwards admitted it. The facts are, that the prisoner Unnoo brought a charge of arson, and, to prove it, examined the other prisoner, a police constable, named Lukhiram. Being repeatedly asked whether they were related to each other, they at first denied any relationship, and then alleged only a distant cousinship, while it is proved, and in the Sessions Court admitted by them, that they are uncle and nephew.

I would note that, in case of giving false evidence, the record of the case in which the evidence was given should always be sent up, which has not been done in this instance.

The 19th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Waging War with Power in alliance with the Queen (Punishment for).

Queen *versus* Keifa Singh.

Committed by the Assistant Commissioner, and tried by the Deputy Commissioner of Cachar, on a charge of waging war with an Asiatic Power in alliance with the Queen.

Punishment for the offence of waging war with an Asiatic Power in alliance with the Queen.

Mr. Justice Jackson.—THIS prisoner has been convicted of waging war against the Munipore Rajah, an Asiatic Sovereign in alliance with the Queen, and under Section 125 of the Penal Code has been sentenced to ten years' transportation.

In the first place, as regards the sentence, I have to remark that it is illegal. The punishment for the offence in the Penal Code is transportation for life, or imprisonment of either description, which may extend to seven years. Transportation for ten years, consequently, cannot be inflicted. The sentence must be either transportation for the prisoner's whole life, or imprisonment not beyond seven years commutable to transportation for the same period.

In the second place, as respects the conviction, the prisoner complains that he cited numerous witnesses to prove that, at the time it is alleged that he accompanied the expedition into Munipore, he was absent on a pilgrimage at Dacca and Brindabun. The Magistrate refused to summon his witnesses unless the prisoner deposited rupees 50 for the expenses of each witness from Dacca, and rupees 200 for each witness from Brindabun.

The result was that none of the witnesses cited by the prisoner were examined. The prisoner complains that the Government had already attached the whole of his estate and sold it, and that he was, therefore, unable to defray the expenses of the witnesses. This attachment and sale took place under the provisions of Sections 183, 184 and 185 of the Procedure Code; the prisoner, not appearing within two years of the date of the attachment, is not now entitled to the proceeds of the sale. The only question is, whether his conviction and sentence can stand, when his witnesses have not been examined. The Magistrate was of opinion that these witnesses were cited by the prisoner for the purpose of vexation and delay, and hence he put in force the provisions of Section 228 of the Procedure Code. The Sessions Judge was of opinion that the Magistrate acted with good discretion; that the witness would not have said anything in favor of the prisoners unless they spoke with certainty, and this it was, he thought, next to impossible that they could have done; that the prisoner did go to Dacca or Brindabun undoubtedly. But the point was, whether he went before or after the expedition to Munipore; and the prisoner's acts in absconding and allowing his property to be set up

to sale, prove that he went after that expedition, otherwise he would have protested against the attachment and sale, or some of his managers would have protested on his behalf.

I think it would have been better had the Sessions Judge sent for and examined some few of the prisoner's witnesses, even though the Government had to pay their expenses. But the course taken by the Magistrate and the Sessions Judge was not against the law, though it is a course which should never be adopted except on extraordinary occasions.

If there was, in my mind, any doubt as to the prisoner's guilt, I would have put in force the provisions of Section 422 of the Penal Code, and directed some of the witnesses named by the prisoner to be examined. But the reasons given by the Sessions Judge are, in my opinion, on the fact of prisoner's absence on pilgrimage, quite conclusive; and it is quite certain that, even if the witnesses did depose to the prisoner's presence at Dacca at the time in question, they would not be believed. I commute the sentence to seven years' transportation.

Mr. Justice Glover.—I concur with Mr. Justice Jackson in upholding this conviction.

The sentence of ten years' transportation, under Section 125 of the Penal Code, is illegal. But as, under Section 419 of the Code of Criminal Procedure, this Court has the power, on appeal, of altering or reversing any finding or sentence, so long as the punishment be not enhanced: and as, under the circumstances, I think that the lesser punishment awardable under Section 125 of the Penal Code is sufficient, considering that the prisoner has lost all his estates, I concur in sentencing him to seven years' rigorous imprisonment, commutable under Section 59 to transportation for a like period.

The 22nd May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Enhancement of punishment under Section 75, Penal Code.

Queen *versus* Moluck Chand Khalifa.

Committed by the Officiating Magistrate, and tried by the Sessions Judge of Moorshedabad, on a charge of theft.

To justify enhanced punishment under Section 75 of the Penal Code on account of previous conviction, both convictions must be of offences punishable under Chapters XII. and XVII. of the Code, and committed after the Code came into operation.

Mr. Justice Glover.—WITH the conviction of the prisoner for theft this Court cannot interfere. The evidence was clearly and properly laid before the Jury, and on that evidence they convicted the prisoner.

But the punishment inflicted under Section 75 of the Penal Code, *viz.*, five years' rigorous imprisonment, is illegal, inasmuch as that Section refers to previous offences coming under Chapter XII. and Chapter XVII. of the Act, whilst the offences of which the prisoner had been convicted were committed before the Penal Code came into operation.

To justify enhanced punishment under Section 75, both convictions must be of offences punishable under the Penal Code, and, therefore, committed after it came into force.

Under Section 379 of the Penal Code, therefore, the highest punishment to which the prisoner is liable would be three years' rigorous imprisonment, and to that punishment I propose to sentence him.

Mr. Justice Jackson.—The Section under which the Sessions Judge has enhanced the punishment in consequence of previous conviction does not apply for the reason assigned by my colleague. I therefore concur in the modification of the sentence which he proposes.

The 23rd May 1865.

Present:

The Hon'ble F. A. Glover, *Judge.*

Using false evidence as true—Sections 196 and 471, Penal Code.

Queen *versus* Oodun Lall.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of corruptly using as true evidence known to be false.

A person who uses in Court false documents as true, besides swearing to their authenticity, may be convicted under Section 196 of the Penal Code only, and not under Section 471 also.

THE prisoner in this case was found guilty by the Jury, under Section 196 of the Penal Code, of using, as true and genuine, certain evidence, to wit, sundry laggits, which he knew to be false and fabricated.

The documents were filed by the prisoner, who was the putwaree of the proprietor in a suit under Act X. of 1859 brought against a ryot for arrears of rent.

He now appeals, urging no less than ten grounds for having the conviction reversed as contrary to law.

The *1st, 3rd, 4th,* and *5th* grounds require no notice; indeed, the prisoner's vakeel abandoned them as untenable. The *8th* and

10th refer to the laggit of 1267 which was not filed by the prisoner, and which, moreover, is admitted to be a true copy of the original and authentic document, and has formed no ground of the prisoner's conviction.

The second ground of appeal appears to me altogether untenable ; doubtless, the evidence would have sufficed to have convicted on either count, for the prisoner used the false laggits as true, besides swearing to their authenticity ; but there was nothing illegal in the Jury convicting on the one and acquitting on the other. Indeed, it would appear that the second finding of "not guilty" under Section 471 was a *pro formâ* one, the real charge against the prisoner being comprehended in Section 196, under which the Jury had already found him guilty. There was no necessity for the second count at all; but. however this may be, the verdict of guilty under Section 196 was a legal verdict, and this Court has no power to interfere with it.

The *6th* ground of appeal is a mis-statement of fact. The prisoner filed the laggits himself to prove that the ryot held a certain quantity of land of a certain rent. This was clearly evidence, and evidence which, if it had not been rebutted by the discovery of the forgery, would have sufficed to have turned the scale against the tenant.

The *7th* is worthless. The object of the false laggits was to induce the Collector to decide the Act X. case in favor of the landlord. and that would have been in the words of the Regulation "to form an erroneous opinion on a point material to the result of the proceeding before him."

The *9th* and last ground is equally bad. The prisoner swore that the laggits he filed [illegible] such a statement, of course meant that he had compared the two together, and that the documents he filed were true copies.

I see no reason to interfere with the verdict. which appears to me to have been a perfectly legal one, and I dismiss the appeal accordingly.

The 23rd May 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Murder—Culpable Homicide.

Queen *versus* Akal Mahomed.

Committed by the Deputy Magistrate of Kishoregunge, and tried by the Officiating Sessions Judge of Mymensing, on a charge of culpable homicide.

What is necessary to bring a case of murder under the 4th Exception to Section 300 of the Penal Code, so as to change the offence into culpable homicide not amounting to Murder.

Mr. Justice Jackson.—THE prisoner has been found guilty, on his own confession, of having assaulted his wife with a heavy stool, with which he struck her so violent a blow on the head that he fractured her skull in several places, and caused her immediate death. The Sessions Judge and the Assessors have found the prisoner guilty of culpable homicide not amounting to murder, and the Sessions Judge has sentenced the prisoner to ten years' transportation. The Sessions Judge, in giving his reasons for considering that the crime was not murder, says that the blow was probably given in the "sudden heat of passion, and without any intention of causing death," and that consequently the crime came under the 4th Exception to Section 300 of the Penal Code.

Here, as is so common with the Sessions Judge of Mymensing, Mr. Dodgson, he is clearly wrong in law. The 4th Exception lays down that "culpable homicide is not "murder, if it is committed without premeditation in a sudden fight in the heat of "passion upon a sudden quarrel, and without "the offender having taken undue advantage "or acted in a cruel or unusual manner."

It is not sufficient for the Sessions Judge to find "that the blow was given in the heat of passion." To bring the case within the Exception he alludes to, he must find all the facts mentioned in that Exception.

In this case there does not seem to have been any fight at all, and certainly the offender took most undue advantage of his unfortunate wife, who was cooking his dinner, in assaulting her with the heavy stool, and acted in a most cruel and unusual manner.

The Sessions Judge's judgment in this case is, therefore, erroneous in law, and his conviction of culpable homicide must, I think, be set aside, and the case remanded for a new trial.

The Sessions Judge should, in putting his question to the Assessors, explain to them the law, as contained in the Penal Code, regarding the difference between culpable homicide and murder. Here the only question apparently is, whether the provocation received by the prisoner was such as to bring him within the first Exception to Section 300.

Mr. Justice Glover.—I concur with Mr. Justice Jackson in ordering a new trial, and I have so often recorded my reasons for thinking such a course proper under the circumstances of a case like the present, that there is no need for my recapitulating them here.

The 24th May 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Possession of land—Trespassers.

Queen *versus* Saadut Khan and Fuzul Ali.

Referred under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated 25th July 1863.

A Magistrate is quite justified in preventing a person from entering upon land in the possession of another.

We do not see in what respects the Deputy Magistrate's orders are illegal.

He went, it appears, to the spot, and, after hearing evidence on both sides, found that the plaintiff had been in possession of the land for a considerable time, some 7 or 8 years. The Deputy Magistrate does not seem to us to have decided in any way the question of title ; practically he conducted the inquiry under Section 318 of the Criminal Procedure Code, and held that the plaintiff was in possession, and had been so for a long time.

Having decided that the land was in the plaintiff's possession, and had been so for years, we do not see why he was debarred from punishing what was, under that state of circumstances, a manifest and admitted trespass. The defendants allowed that they had dug the trench and stood upon their rights to do so, alleging the land to be their own. It was for them to have proved their allegations in the Civil Court, and to have regained possession ; but as they chose to enter upon land which, although it might have been justly their own, was proved to have been in the possession of others for several years, and to commit a certain amount of damage to it by digging a trench, we think the Magistrate's order was justified, and that the defendants were rightly prevented from entering upon land in the possession of another.

The 25th May 1865.

Present :

The Hon'ble G. Campbell and E. Jackson, *Judges.*

Lurking House Trespass and Theft.

Queen *versus* Musst. Mina Nuggerbhatin and Luckea.

Committed by the Deputy Magistrate of Nawada, and tried by the Sessions Judge of Behar, on a charge of House-breaking with intent to commit theft, &c.

Discussion as to whether cumulative punishment under Sections 454 and 380 (*i. e.* Lurking House Trespass and Theft) is legal.

Mr. Justice Jackson.—I see no reason to interfere in the conviction of the prisoners. I have no doubt they did break their way into the house, and commit the crime of lurking house trespass, with the intention to commit theft. But it has been ruled that, in such a case, although there has been theft, the conviction should be only under Section 454 of the Penal Code, and not under that Section and also Section 380. I think the sentence passed under Section 454 is sufficient, and that the sentence passed under Section 380 should, therefore, be remitted.

Mr. Justice Campbell.—In my opinion, a cumulative sentence under Sections 454 and 380 is legal ; but in this instance, looking to the circumstances of the case, I think the term of imprisonment awarded under Section 454 sufficient, and, in that sense, I concur in remitting the additional term.

The 30th May 1865.

Present :

The Hon'ble F. A Glover, *Judge.*

Evidence (of Briber)—Bribing Public Servant.

Queen *versus* Obhoy Churn Chuckerbutty and Nobin Chunder Chuckerbutty.

Committed by the Assistant Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of taking gratification under Section 161 of the Indian Penal Code.

The evidence of the person who bribes is admissible against the person bribed.

A person, who accepts, for himself or for some other person, a gratification for inducing, by corrupt or illegal means, a public servant to forbear to do a certain official act, is punishable, not under Section 161, but under Section 162 of the Penal Code.

The circumstances of the case have been fully detailed in the remarks of the Sessions Judge, and there is no need for me to recapitulate them.

The prisoners, who have been ably defended by Counsel, urge—(1) that the evidence of the witness, Nobin Chunder Koondo, was inadmissible, he being the person said to have paid the bribe ; (2) that the conviction, supposing the case proved against them, should have been under Section 163 of the Penal Code, and not under Section 161 ; and (3) that the evidence generally is discrepant and insufficient for conviction. The first objection is worth nothing. Construction No. 757

quoted by the prisoner's Counsel, recites that a Court cannot *compel* a person to give evidence on oath, touching a bribe alleged to have been administered by himself. But there is nothing in the law, *vide* Reports, W. P., 1855, Part II., page 81, to prevent him giving such evidence against the person bribed if he chose to do so.

The witness, Nobin Chunder, could have refused to answer any question that would have criminated himself, and, as he elected to tell the whole story, he has, of course, laid himself open to a criminal information; but his evidence was perfectly admissible, and the Sessions Judge was quite right to receive it.

The second objection depends on the Court's determination of the third. And, with regard to this, I see no reason to differ from the Sessions Judge. I have gone very carefully over all the evidence, and, although there are doubtless some small discrepancies observable, they are not of a nature to throw suspicion on the evidence generally, which is essentially consistent and satisfactory. The Assistant Magistrate, who got up the case for the Sessions, states the difficulty he had in inducing the parties to come forward, and it is quite clear that there was neither intention nor desire to expose the offenders, and that chance, which directed the Assistant Magistrate's attention to a "paragraph" in a local native newspaper, was the cause of the prosecution. It is contended for the prisoners that this "paragraph" was part of a cleverly contrived plot, and that it was inserted in the expectation of its leading to enquiry; but this is simple assertion, rebutted by the sworn testimony of the editor of the paper, who deposes that he inserted the paragraph himself, and on his own responsibility; being aware of the truth of the facts therein stated, and that the prosecutor neither asked him to insert it, nor knew of its insertion. I may mention here another objection urged by the appellant's vakeel against the Assistant Magistrate's competence to set this prosecution going; the objection is untenable, as the case was investigated by order of the Magistrate, and his Assistant was merely an officer carrying out the orders of his official superior.

For the rest, the evidence distinctly proves that both of the prisoners were present, and took part in the receipt of the money; and that the object of the bribe was the abandonment of a police case against one Mohima Chunder Koondoo, a nephew of the prosecutor, which case, had it been carried out, would have enabled the police to search Nobin Chunder Koondoo's house, and to subject him to great indignity. The witnesses who depose to these facts are men of substance and respectability in the town of Commercolly, and their evidence is corroborated by the production of the gomastas and the prosecutor's account books, in which the item 300 rupees is entered on the day stated. These books are denounced by the prisoners' Counsel as false, and made up for the occasion; but neither the prisoners' vakeel in the Sessions Court, nor the assessors themselves, who acquitted the prisoners, could find anything to object to on their appearance; and even if it be admitted that the smaller book might, from its containing comparatively few pages, have been written for the purpose of bolstering up the present charge, the same remark cannot apply to the larger *khata bhai*, which belonged to Futteh's *mahajanee* establishment, and which contained hundreds of entries, both before and after the date of the present transaction, and against which nothing was alleged.

The evidence adduced for the defence is absolutely worthless, and I have no hesitation in agreeing with the Sessions Judge that both prisoners are guilty.

It remains to be seen to [illegible]

It is not sufficient for the [illegible] to find "that the blo[illegible] of passion." To bri[illegible] Exception he alludes [illegible] facts mentioned in tha[illegible]

In this case there d[illegible] been any fight at all, an[illegible] der took most undue ad[illegible] tunate wife, who was co[illegible] assaulting her with the he[illegible] in a most cruel and unus[illegible]

The Sessions Judge's j[illegible] is, therefore, erroneous i[illegible] viction of culpable homici[illegible] set aside, and the case rema[illegible]

The Sessions Judge sho[illegible] question to the Assessors [illegible] the law, as contained in th[illegible] garding the difference b[illegible] homicide and murder. He [illegible] tion apparently is, whether t[illegible] ceived by the prisoner was [illegible] him within the first Exceptio[illegible]

Mr. Justice Glover.—I [illegible] Justice Jackson in ordering [illegible] I have so often recorded my r[illegible] ing such a course proper un[illegible] stances of a case like the p[illegible] is no need for my recapitula[illegible]

with one under Section 161, there is no reason for interfering with the Lower Court's order, further than to amend the Calendar, and substitute Section 162 for Section 161.

The 30th May 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Accused (Right of, to cross-examine Witnesses).

Queen *versus* Nobo Coomar Banerjee.

Referred under Section 434 of the Code of Criminal Procedure and Circular Order No. 18, dated 15th July 1863.

Conviction quashed, the accused not having been allowed an opportunity to examine certain witnesses.

THIS case has been sent up by the Sessions Judge under Section 434 of the Code of Criminal Procedure.

It appears that one Nobo Coomar Banerjee was convicted by the Magistrate of Howrah under Section 403 of the Penal Code, and sentenced to a fine of 50 rupees, or, in default, a month's rigorous imprison- [illegible] for misappropriating a piece of silk [illegible] be a part of a quantity lost in the [illegible]

[illegible] Sessions Judge holds the conviction [illegible] *first*, because there is no proof that [illegible] had ever been lost in the Cyclone; [illegible]*ndly*, because the accused had not [illegible]llowed an opportunity of cross-exa- [illegible] the police witnesses.

[illegible]irst objection appears to us unten- [illegible] The silk might or might not have [illegible]rt of that lost in the Cyclone. [illegible]mption arising from the different [illegible]nces detailed by the Magistrate [illegible]m to shew that it was. But in [illegible]upposing the accused's possession [illegible]lished, he would have been equally [illegible]r Explanation 2 of Section 403, [illegible]found the silk before the Cyclone [illegible] other time, if he did not use [illegible]means to discover and give notice [illegible]ners. It was not, it appears to us, [illegible] to a conviction to prove that the [illegible]ctually lost during the Cyclone, [illegible]hat might have been the allegation [illegible]ecution.

[illegible]d objection must, we consider, [illegible] The accused requested permis- [illegible] request was granted by the [illegible] to re-summon, and to cross- [illegible] police witnesses; but the case [illegible]disposed of against him without any further notice being taken of his application, and without his having been allowed the opportunity prayed for.

We therefore quash the conviction, and direct that the evidence be taken *de novo*, giving the accused the opportunity of cross-examining the witnesses referred to.

The 2nd June 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Assessors (Grounds of opinion by)—Admissions by Prisoners (to the Police).

Queen *versus* Bushmo Anent.

Committed by the Deputy Magistrate of Serajgunge, and tried by the Sessions Judge of Rajshahye, on a charge of murder.

Assessors ought to give the grounds of their opinion particularly when they differ in opinion from the Judge.

Admissions made by prisoners to police officers, while in their custoby, are not admissible in evidence particularly when no witnesses are called to prove them.

BEFORE passing final orders in this case, we think that some further enquiry should be made.

We observe that, although there is a strong *primâ facie* case made out against the accused, still the assessors, who sat with the Sessions Judge on the trial, recorded their opinion that the charge was not proved against her. The Sessions Judge differs from the assessors, and has given it as his opinion that the assessors are for an acquittal, not from an honest conviction of the accused's innocence, or from an honest doubt as to her guilt, but from a desire to have no hand in convicting a person of a crime for which the probable sentence will be death. We think that, before the Sessions Judge came to the conclusion that the assessors had no ground for their opinion, he should have asked them as to the grounds upon which they arrived at it. Under the law a Jury is required to deliver its verdict. But assessors are appointed to aid the Judge in the trial, and are to give their opinion, and, when that opinion differs from that formed by the Sessions Judge, the latter should always ascertain the grounds of the assessors' opinions. The decision does not rest with them, but they are to assist the Judge at the trial, and in no better mode can they assist him than by stating the reason for their opinion when the case is one on which there may be a difference

of opinion. We request that the Sessions Judge will re-call the assessors, and will ascertain from them and forward to this Court the reasons upon which they were of opinion that the accused ought to be found not guilty.

We think also that some further enquiry should be made in the case.

Before the Magistrate, Nursing Pal deposed that the accused had had some quarrel with his wife. The wife should be sent for and examined on the point. Horree Chung, the servant of Gobin Pal, should be further examined as to what he saw the child doing at one pahar of the day on which it was lost, and who was then with the child, and where the accused then was. Nursing Pal should be asked, who the man was whom he says he met when he saw the accused bathing, and who told him that the accused had not taken the child away, and that man should be examined. Then, again, when the accused returned from bathing, and before the dead body of the child was brought in, some persons must have questioned the accused as to what she had done with the child, and what were her replies then; and also, after the dead body was brought in, what did she say when she was accused. Nursing Pal deposes that there was a faqueer in the house assisting to revive the child. Is anything known regarding this faqueer, and how did he come there? The accused states that she obtained the gunny bags on which she was found sleeping from Nemai Chuneea; he, or his people, who gave the bags, should be examined as to what occurred when the bags were given. The accused denies that the ornaments were found upon her. This is the most important piece of evidence in the whole case, and yet there is a direct contradiction in the depositions before the Sessions Judge and the Magistrate; before the latter the witness says that the bag containing the ornaments fell from her person as she stood up in the jungle on being awoke; and before the former they say that the accused, while going to the house of Romanath Sen, was pressing something to her side, and that this was, on reaching Romanath's house, found to be a bag containing these ornaments. This discrepancy should be cleared up. The most valuable ornaments appear to be still missing. The accused, after being cautioned, according to Section 373, that she has the option of refusing to answer, should be asked as to where these ornaments were found, if not upon her, and whether she did take the child to her house in the morning, and, if so, then for what purpose she took the child, and what became of it, and when she last saw it.

The Sessions Judge has directly contravened the law in admitting, in evidence against the prisoner, admissions said to have been made by her to the police officers while in their custody. It is the more necessary that any such statement should be at once rejected as evidence, now that no witnesses are required to attend to prove such statements.

The Sessions Judge is requested further to examine the witnesses, to ascertain if the child could walk about easily, so that it might have strayed into the jungle where it was killed. Is it possible that any suspicion can attach to Dusrut Malee, who goes to the jungle to cut wood, and could he have placed the ornaments where they were found if they were found on the accused, when she was sleeping? Dusrut Malee's house might be searched to ascertain if the rest of the ornaments are with him. As it is very desirable that these enquiries should be held by the Officiating Sessions Judge before the return of Mr. Belli for whom he is acting, we direct that he will at once make such arrangements as will enable him to complete the necessary proceedings at Pubna before he vacates his present office.

The 2nd June 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Murder.

Queen *versus* Nilmadhub Sircar, Ameeroodeen, Fagoo Khan, and Hurree Raj Bungshee.

Committed by the Officiating Joint Magistrate of Moorshedabad, and tried by the Sessions Judge, on a charge of murder.

A is guilty of murder if he several times kicks *B*, who, after having been severely beaten, has fallen down senseless; as *A* must have known that such kicks were likely to cause death in *B's* state at that time.

We have carefully considered the proceedings held on the trial of the prisoners. and are of opinion that the evidence recorded does not bear out the offence of murder, except against the prisoner Hurree. He must have fully known, when he gave several severe kicks to the person who was in his charge, and who, having been severely beaten, had fallen down senseless on the road, that such kicks were likely to cause death in the

state in which the man then was. We therefore confirm the conviction of murder against him; but, under all the circumstances, sentence him to transportation for life. As against the other prisoners, we are of opinion that the evidence proves the offence of voluntarily causing grievous hurt for the purpose of extracting information and confession from the sufferer to lead to the detection of an offence, and, under Section 331 of the Penal Code, we sentence them to 10 years' transportation.

The 3rd June 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judge.*

Attempt to murder—Security for good behaviour.

Queen *versus* Beharee *alias* Kurreem Bux.

Committed by the Officiating Magistrate of Patna, and tried by the Sessions Judge of Shahabad, on a charge of attempting to murder.

Prisoner acquitted of attempt to murder, but directed to be proceeded with by the Magistrate under Section 297, Code of Criminal Procedure, with a view to security being taken for his future peaceable behaviour.

Mr. Justice Jackson.—THE prisoner has been convicted of attempting to murder Mr. Ainslie, the Judge of Patna, and has been sentenced to ten years' rigorous imprisonment.

Mr. Ainslie's deposition is to the following effect:—"In the evening of Saturday, the "18th March last, I left Cutcherry about ¼ "to 6 on my way home, driving in my bug-"gy. On leaving the Cutcherry compound, I "saw a man, whom I recognize as the pri-"soner, standing on the north side of the "road with his back towards me, about 8 or "10 yards in front of my house. I called out "to warn him. He crossed over to the "south side of the road, keeping his back "towards me. I also edged off to the same "side to avoid him; but the more I pulled to "one side, the faster he came. I was obliged "to pull up to avoid running over him, as "I could not pass between him and a wall "which skirts the road to the south. As soon "as the horse stopped, he turned round, "seized the horse or some part of the har-"ness, with his left hand, and raised his "right hand, in which he had a knife, over "his head. I then urged my horse on; and, "as it sprang forward, the prisoner struck "with the knife, and jumped on one side to "avoid the wheels of the buggy. He then "ran a few paces after the buggy, after which "he stopped. The horse was uninjured, the "blow having taken effect on the collar. "The prisoner did not attempt to strike at me. "He ran after the buggy, brandishing his "knife, and muttering something, but I "could not understand what he was saying. "The prisoner appeared to be perfectly "sensible, but in an excited state. I think "the prisoner's intention, undoubtedly, was "to attack me. Had the blow taken effect "on the horse three inches from the back, "the horse must have been brought to the "ground, and I should have been thrown "out of the buggy, and at the prisoner's "mercy. The prisoner might have avoided "the buggy; if he had stood still, he would "have been quite free of the buggy."

The prisoner's defence at the Sessions was: "I was drunk with gunja. I tried to get "out of the way of the buggy, and I acci-"dentally struck the collar of the horse. "I had the knife about me for protection "against tigers." Then he says: "A faqueer "threatened my life, and I always had the "knife with me. I did not hear the sahib "coming."

Mr. Howard, the Superintendent of Police, deposes that, on the prisoner being arrested shortly afterwards, he questioned the prisoner as to his act and the motive, when the prisoner said, *Ham admee ka marna wallah nahie, i. e.,* I am not the person to strike a man. Then he said he had been annoyed at something, and had struck with the knife.

Ramdun chuprassee and Guddeep Suhai depose that, on being told by Mr. Ainslie of the occurrence, they went after the prisoner, and found him brandishing his knife and saying, *Hum koi ko mara nahie.* I have struck no one; and that, on an attempt being made to seize him, he put the knife to his throat.

The Sessions Judge and the Assessors are of opinion that the prisoner committed the act of striking the horse with the ultimate object of striking Mr. Ainslie; and that the prisoner had a premeditated deliberate intention to murder Mr. Ainslie. The Sessions Judge comes to this conclusion from the narrow and unfrequented part of the road where the prisoner met Mr. Ainslie, his deliberately and systematically impeding the progress of the buggy, his suddenly turning round, seizing the horse by the harness, and brandishing the knife, the severe blow which he aimed at the horse, the knife

itself being of an unusual shape, not such as is usually kept by natives for ordinary purposes, but a murderous weapon for the possession of which the prisoner could give no satisfactory accounts, and lastly the conduct of the prisoner since his arrest, his feigning insanity and general demeanour.

There is no doubt that Mr. Ainslie, the only person who witnessed the assault, is of opinion that the attack was intended beforehand, and was directed ultimately at himself. But we must judge of the prisoner's intentions by his act, and by all the surrounding circumstances of the case.

In the first place, there is nothing to prove that the prisoner knew who the driver of the buggy was, until after he had struck at the horse. He told the Superintendent of Police that he knew him to be the Hakim of the Adawlut, but he may have ascertained this after the buggy reached him, and he turned round, and saw the driver. Mr. Ainslie's deposition is that the prisoner had his back turned towards the buggy from the time he came in sight until he actually turned round and struck at the horse. On the other hand, it may be that the prisoner might have seen Mr. Ainslie in the buggy before he left the Cutcherry compound. There is no evidence to shew whether this was possible, *i. e.*, whether the view was open or impeded by any wall.

In the second place, there is great probability in the defence of the prisoner that he tried to get out of the way of the buggy, and, finding himself very nearly run over, struck at the horse as he jumped aside to escape the buggy wheel. The confused habit of people, when called to get out of the way of a buggy, at once to cross the road and get still more in the way, is very common. The prisoner, when called to, edged off to the same side of the road to which Mr. Ainslie did, until the distance between them of 8 or 10 yards only was passed, and the buggy was close upon the prisoner's heels. Mr. Ainslie deposes that he then pulled up, but he must have been close upon the prisoner; and the prisoner, having his back turned towards him, may have thought that the horse and buggy were going over him, and so turned round and seized hold of the horse by the harness. It is extraordinary that the prisoner should have had a knife so ready to his hand that, in the act of turning round, he brandished it in his right hand with his arm up in the air. But, if he had such a knife either in his hand or easily laid hold of, it is possible that he may have merely brandished it with the intention of making the driver stop. It might be that this did not have the anticipated effect, and it did not, as Mr. Ainslie states that he then "urged his horse on," or "let his horse go," as he says before the Magistrate; and the prisoner then, finding the horse and buggy were going over him, struck at the horse, at the same time jumped aside to escape the wheels.

It may be very fairly urged for the prisoner that there is very little in all these facts to prove that the prisoner had any premeditated intention to attack Mr. Ainslie; and that the whole of the circumstances are very natural, and such as might occur to any stupid or confused person who was nearly run over by a buggy.

But the suspicious circumstance in this case is that the prisoner had the knife so ready in his hand, and the peculiarity of the knife itself. It is not a knife such as natives ordinarily use. The Sessions Judge describes it as 5 inches long in the blade, with a sharp point and double edged, and having an iron guard. The prisoner admits that it is not an ordinary knife. No account is given by him as to where he obtained it. It is curious that no question was put to him on this point, and it is not clear whether he had lately obtained it, or had it long by him. He states that he kept it for protection against tigers and against a faqueer who had threatened his life. No question was put as to what faqueer he alluded to. But it may be inferred that all this part of the statement is false. It is in no way supported by any evidence; and the wearing of a dagger like this, as a protection against tigers in the streets of Patna, is simply ridiculous. The prisoner admits apparently that he has for some years resided in Patna, hanging about other people's houses; but one great difficulty in the case arises from the fact that no one will admit having ever seen the prisoner, or had any intercourse with him, which can hardly be true; and the police have utterly failed to discover anything as to his antecedents. But, to return to the prisoner's answer, it may be said to be an admission that the prisoner knew that the knife he carried was not one to be used in ordinary purposes, but was one to be used to take life. Had it been an ordinary knife, I should have had no hesitation in acquitting the prisoner at once. But it is still doubtful whether, notwithstanding the suspicions arising from the possession of this knife, the prisoner did premeditate an attack on Mr. Ainslie.

As to his conduct after he had struck the blow, there is the fact that he ran after the buggy a few paces, brandishing the knife, and muttering in an excited state. Then it is proved that he ran away, and before he was laid hold of, as well as after it, he, knowing full well what he would be charged with, said he had struck no one, and had no intention to strike any man. It may be said that the thought which was uppermost in his mind showed what his real intention was. But, on the other hand, it would be the natural exclamation of a man who had not intended to do more than save himself. I think nothing of his running a few paces after the buggy.

The prisoner appears to be an outcast faqueer, living by begging, whose very mode of life shows that he is not altogether in his right senses, half Hindoo and half Mahomedan, as appears from his two names, Beharee *alias* Kureem Bux, probably, as he states, a smoker of gunja. It is possible that this sort of man might be made use of by designing persons to attack Mr. Ainslie, and circumstances have lately occurred at Patna which might have led such persons to make use of him. But we cannot convict the prisoner on surmise. We must be quite satisfied that he did intend to attack Mr. Ainslie. The Sessions Judge says that he could have had no better mode of reaching Mr. Ainslie in the buggy than by disabling his horse. I cannot agree with him. I should think that a person wishing to attack Mr. Ainslie would not choose the time when Mr. Ainslie was driving in a buggy to make the attack; and the idea which is suggested against the prisoner, that he intended first to kill the horse, and then attack Mr. Ainslie, is not one which, I should say, did enter into any native's head, or, indeed, any other person's. But, admitting what the Sessions Judge says, it is not satisfactorily proved that the prisoner did try to disable the horse. Mr. Ainslie's own deposition shows that he did not attempt to strike the horse until after Mr. Ainslie urged it on. If the prisoner's attack was premeditated, would he have gone on the road with his back turned towards the buggy, and only have laid hold of the horse when it was nearly upon him, and even then not have struck until Mr. Ainslie urged his horse on? If the act was premeditated, the prisoner would certainly have struck his blow at once on turning round, and not have waited brandishing his knife until the horse was urged against him. I am not satisfied, looking to all the circumstances that the act was premeditated; but entertain a clear doubt of the prisoner's guilt. It is true, as the Sessions Judge says, that there was no person near when the attack was made, but the road just outside the gate of the Patna Judge's Cutcherry compound can hardly be an unfrequented road. The fact that it was narrow tells in favor of the prisoner more than against his story. The only evidence upon which any suspicion of premeditation rests against the prisoner is his possession of this peculiar knife; and his lame account as to the reason he had it on him, and the ready manner in which he used it. No doubt, as a general rule, a native, in the same predicament as the prisoner, does not use a knife. But the prisoner is one of those creatures whose whole life is not like that of ordinary persons, and whose mind is probably more or less affected.

Although, after giving all the facts of the case my best consideration, I would acquit the prisoner of the charge of deliberate attempt at murder, still I think that he ought not to be unconditionally released. A person who wears such a murderous weapon as the prisoner admits that he is in the habit of wearing, and for the purpose of using it, as he admits, against other persons with whom he has a quarrel, and is of such a violent disposition, either naturally or from indulgence in gunja, that on the slightest imagined provocation he is ready to make use of it, should not be allowed to go at large without some substantial security for his good behaviour. I would therefore direct the Magistrate of Patna to take proceedings against the prisoner under the provisions of Section 297 of the Procedure Code, and to call upon the prisoner as a dangerous character, whose release, without security, would be hazardous to the community, to furnish his own recognizances, and two substantial securities in such sums as the Magistrate may consider proper, and, in default, to keep the prisoner in custody until such time, not exceeding 3 years, as the Magistrate is satisfied that the prisoner can be set at large with safety.

Mr. Justice Glover.—The prisoner ha' been convicted, under section 307 of op. Penal Code, of an attempt to murder ther Ainslie, the Judge of Patna, and h at least sentenced to rigorous imprisonme s Judge, years. itnesses to

The case was originally s Judge in the English Der at the two men since, however, been ap they met in the

comes before us on the facts as well as on law.

I have gone repeatedly and carefully through the evidence, with a full appreciation of the magnitude of the interests involved, and, in my opinion, it fails to establish the charge.

It is admitted that the prisoner was walking quietly along the road with his back to the buggy, when Mr. Ainslie came out of the Cutcherry compound. It is likewise admitted that, on being called to get out of the way, he walked across the road—as natives almost invariably do instead of stepping on one side—still with his back to the buggy. Mr. Ainslie appears to have taken the same side of the road, and thus, to avoid running over the prisoner, was obliged to pull his horse up short. The prisoner, finding himself in this position, suddenly turned round, and seized the horse's bridle, or some other part of the harness, it is not very clear which, and, on Mr. Ainslie's urging the animal on, struck at the horse with a broad bladed dagger-knife; fortunately the weapon lighted on the harness, and the horse was uninjured.

The prisoner then sprang on one side to avoid the wheels, and ran a step or two after the buggy. He was arrested, a few minutes after, as he was going through the bazar, by the police, to whom Mr. Ainslie had in the interim applied for assistance. He held the knife still in his hand, and, when questioned, declared that he had struck no one.

Direct evidence, therefore, of any attempt or intent to murder Mr. Ainslie, there is none. The attack was made solely on the horse, and went no farther; and the question is, is it right to presume that such an attack was a prelude to one intended to take effect on the driver?

The prisoner has been convicted on a series of presumptions. He is presumed to have known that the Judge was behind him, presumed to have got in his way intentionally so as to compel him to stop his horse, presumed to have struck at the animal with the intention of bringing him down, and so leaving the occupant of the buggy at his (the prisoner's) mercy; and lastly he is presumed horsve feigned insanity immediately after that that in order to escape the consequences ready to me.

round, he these fair presumptions on the his arm up it by evidence? The prisoner, a knife either in-crazed faqueer, in a state of, it is possible, like all his tribe, is walking down a rather narrow road; he hears a shout from behind bidding him get out of the way, and he walks across the road for that purpose without turning his head, not knowing what is behind him, and apparently not caring. He suddenly finds himself almost under a horse, and only saved from being knocked down and trampled on by the driver's pulling the animal up short. This is a bare statement of admitted facts, and, under such circumstances, was it an unnatural consequence that the prisoner should have seized the horse by the bridle; and, on the animal's being quickly urged on, should have, in the confusion of the moment, made use of his weapon against it; and is it fair to presume an intention of murdering the occupant of a buggy, because a man in a rage at being nearly run over draws a knife and strikes at the horse? There is not the slightest reliable proof that, at the time of the occurrence, the prisoner knew who was coming, or, indeed, that any one was coming. His back was to the buggy; he never turned round till almost under the horse's feet; he never made the least attempt to attack Mr. Ainslie, but contented himself with stabbing at the horse that had nearly knocked him down. The hypothesis of the prisoner's guilt should flow naturally from the facts proved, and be consistent with them all; and can it be said that the prisoner's acts were so unnatural as to be incredible except on the supposition of his guilty intent? I think not.

The prisoner's mentioning after his capture that the occupant of the buggy was the Hakim of the Adawlut, is no proof that he knew who Mr. Ainslie was at or before the time of the attack on the horse, whilst all the circumstances of the case go to show that he did not know who was behind him.

The presumption that the prisoner got in Mr. Ainslie's way in order to compel him to stop his horse, seems to me altogether untenable. The prisoner was sidling off to the left side of the road, having crossed over apparently from the right; and nothing could have been easier than for the Judge to have gone on the right side instead of the left, and so have avoided the prisoner altogether.

As to the presumption that the man was feigning madness at the time he was captured, I have only to remark that all the witnesses admit that, when arrested, he was in a wild excited state, though not actually intoxicated. As to his exclamations that he

had struck no one, &c., &c; which have been taken as evidence of guilty intention, they seem to me merely the natural expressions of a man in such a position—at all events they are rather weak grounds on which to build a charge like the present.

Neither can the possession of a dangerous weapon be under the circumstances of the present case any fair presumption against the prisoner. These wandering faqueers often carry similar weapons, and there is nothing to show that he made the slightest attempt to use it against Mr. Ainslie. The evidence that he ran after the buggy muttering is very vague and unsatisfactory, and the most it amounts to is that the prisoner, after springing on one side to avoid being run over by the buggy wheels, made a step or two in the direction of the retreating vehicle.

For these reasons I concur with Mr. Justice Jackson in thinking that the charge of "attempting to murder" is in no wise made out against the prisoner; late events at Patna have apparently given a significance to the present charge which, in my opinion, it in no way deserves.

But, although I would acquit the prisoner of any attempt either to murder or to attack Mr. Ainslie, I consider him a sort of person who ought not to be left at large without ample security for his future peaceable behaviour.

He is evidently one of those half-savage, half-crazy, wandering mendicants, whose passions are easily and fatally excited, and, in whose case, the provisions of Section 297 of the Criminal Procedure Code can be most properly and advantageously employed. I concur with my learned colleague in directing the Magistrate of Patna to proceed against the prisoner under that Section.

The 11th June 1865.

Present:

The Hon'ble G. Campbell, E. Jackson, and F. A. Glover, *Judges.*

Murder.

Queen *versus* Ram Nath Gwala.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of murder, and sentenced by the Sessions Court to death.

Sentence of transportation for life, instead of death, in a case of murder.

Mr. Justice Jackson.—THE only question in this case is the sentence which should be passed upon the prisoner. The evidence proves clearly that he committed the offence of murder. His defence, that he was intoxicated at the time, and did not know what he was about, does not change the nature of the offence. It is still murder. There are two punishments for murder laid down in the Penal Code: death and transportation for life. The evidence leads me to believe that the murdered man and the prisoner had been drinking together, though the Sessions Judge did not make as much enquiry upon this point as he should have done; and that the murdered man excited the prisoner's passion by calling him a thief, the result being that they separated, and the prisoner, obtaining a sword from a neighbour's house, attacked his friend, and killed him. There is no doubt, I think, that, had the prisoner been in his complete senses, he would not have committed the act, and, under the circumstances, it appears to me that a sentence of transportation for life would be sufficient for the ends of justice.

Mr. Justice Glover.—I regret to be obliged to dissent from the opinion of my learned colleague.

That the prisoner killed Bollakee, the evidence leaves no doubt; and that the crime was murder, is unquestionable.

I can find no proof on the record that the man was drunk at the time. One witness, the lad Gooja (not examined on oath) deposes that he thought the prisoner was drunk, as he was staggering; but this is opposed to the evidence of Ramruch, who lent him the sword with which the murder was committed. This witness swears positively that the prisoner was not intoxicated when he came to borrow the weapon.

I can find no proof either that the prisoner had been drinking at Madaree Pasee's shop. The deceased's son, who was with his father at the time, says nothing about it, at least not in his evidence to the Sessions Judge, nor does the prisoner call any witnesses to prove the fact.

All that is proved is that the two men abused each other when they met in the shop.

Had it been established that the prisoner was drunk at the time of the murder, I would have agreed that, under the circumstances of this particular case, his punishment might have been commuted to transportation for life; but, as there is nothing to shew that he did not kill Bolakee whilst in the full possession of his senses, I see no reason for sparing his life. Whatever provocation he may have received in return for his own abuse of the deceased, it is clear from the evidence that, after having had time to cool down, he went and borrowed a sword, and followed Bolakee for some little distance from the place where they had quarrelled, and then killed him with repeated blows of his weapon.

I would confirm the sentence of death proposed by the Sessions Judge.

Mr. Justice Campbell.—Under all the circumstances of the case, and considering how very effective and deterrent a punishment is transportation for life in this country, how near I may say it comes to death, I concur with Mr. Justice Jackson in thinking transportation for life the most appropriate punishment in this case. Sentence will issue accordingly.

The 12th June 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Insulting Language—Criminal Trespass.

Queen versus Raj Koomar Moitro.

Referred under Section 434 of Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

The mere absence of any formal charge of using insulting language in addition to the charge of criminal trespass is no sufficient illegality to warrant an annulment of the proceedings; the said language having been complained of by the complainant at the first.

We have been through the proceedings in this case, and are of opinion that the delay in disposing of this complaint from August to March inclusive is not accounted for, and is not satisfactory. But we are unable to find any grounds for reversing the sentence and refunding the fine as proposed by the Sessions Judge. The charge of insulting language under Section 504, in addition to the other charge of criminal trespass, was distinctly mentioned by Mr. Smallwood from the first, and the defendant heard all the evidence to this charge, and was not in any way prejudiced by the absence of any formal charge of using such insulting language. Any such irregularity, therefore, will not, under Section 439 of the Code of Criminal Procedure, vitiate the trial; and, applying Section 426 to this case as one of revision, we do not find that the accused has been really prejudiced by any such error or defect in the trial. The fine may perhaps be excessive, but there was evidence to the use of the bad and insulting language complained of, which would sustain a conviction under Section 504 of the Penal Code, and we cannot interfere on this ground.

On the whole, then, we think that, although the fine is somewhat heavy for the provocation offered, we discern no sufficient illegality to warrant an annulment of the proceedings, and must allow the sentence to stand.

The 12th June 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Jurisdiction (of Deputy Magistrate)—Wrongful confinement and extortion.

Queen *versus* Shamsoondur Ghosal and three others.

Referred under Section 434 of the Code of Criminal Procedure, and Circular Order No. 18, dated the 15th July 1863.

A Deputy Magistrate cannot try a case which includes a complaint of wrongful confinement and extortion, but should follow the rule laid down in Section 276 of the Code of Criminal Procedure.

We concur with the Sessions Judge in thinking that the Deputy Magistrate should not have tried this case, which includes a complaint of wrongful confinement and extortion. We therefore quash his proceeding, and direct him to follow the rule laid down in Section 276, Chapter XVI. of the Code of Criminal Procedure.

The 17th June 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Theft in Dwelling-house (by Constables)—Witnesses not named by prisoners before Magistrate—Deputy Magistrate not to act as Magistrate and Prosecutor in the same case, and take confessions of prisoners.

Queen *versus* Boidnath Singh, Mehir Khan, and Meer Majid Ally.

Committed by the Deputy Magistrate of Nugwan, and tried by the Sessions Judge of Midnapore—Crime charged, Criminal Misappropriation of Property.

Theft by constables of property from the house they were employed to guard is punishable under Section 380, and not Section 409, Penal Code.

According to Section 375, Criminal Procedure Code, a prisoner is not entitled of right to have witnesses not named by him before the Magistrate, summoned at the Sessions trial.

A Deputy Magistrate should not act as Magistrate in a case in which he is himself the prosecutor, and take confessions of prisoners before himself.

Jackson, J.—THE prisoners were constables employed to guard the house and property of Mr. Rattray, and took advantage of their position to steal some of his property. The stolen articles were either found in their houses or pointed out by them hidden under ground; and, when examined before the Deputy Magistrate, each prisoner admitted his guilt.

They are here represented by a vakeel, who argues that their conviction under Section 409 of the Penal Code is illegal, as they were not entrusted in any manner with the property which they stole. This objection is, I think, good. The wrong Section of the Penal Code has been applied to their case. They should have been convicted under Section 380. I see no ground whatever for interfering with their sentence, which they all fully deserve.

It is said that the Sessions Judge should have sent for the witnesses named by the prisoners at the trial. Section 375 of the Criminal Procedure Code lays down that, if the accused parties will not name their witnesses when directed to do so by the Magistrate, they are not entitled of right to have them summoned at the Sessions trial. If the Sessions Judge entertains any doubt as to the prisoners' guilt, he should send for the witnesses; if not, it is not incumbent on him to do so. If I had any doubt whatever as to their guilt, I should even now direct their witnesses to be examined; but I agree with the Sessions Judge that the crime is proved in the clearest possible manner against all the prisoners.

I think the Deputy Magistrate was very wrong to act as Magistrate in the case in which he was himself prosecutor, and to take the confession of the prisoners before himself. In deciding on the guilt of the prisoners, I take no account of those confessions. There is ample evidence without them. However irregular may have been the proceedings of the Deputy Magistrate, the prisoners had a full and proper trial before the Sessions Judge. The irregularities of the Deputy Magistrate do not vitiate the proceedings held by the Sessions Judge (Section 426 of the Penal Code).

The case must go before another Judge, as I would alter the conviction from Section 409 to 380, though I would confirm the sentences passed on the prisoners.

Glover, J.—I concur with Mr. Justice Jackson in amending the calendar as proposed. I concur also generally in the view he has taken of the evidence, and think that the prisoners are clearly guilty under Section 380 of the Penal Code. It would be as well if some notice were taken of the Deputy Magistrate's proceedings.

The 20th June 1865.

Present :

The Hon'ble W. S. Seton-Karr, E. Jackson, and F. A. Glover, *Judges.*

Forgery—Jurisdiction—Duty of Judge—Sentence when Judge differs from Jury—Appeal on facts (Offence committed before 1st January 1862).

Queen *versus* Sheikh Gholam Mustuffa.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Dacca—Crime charged, Forgery.

The accused was charged with forgery of a hibbanamah and of the Kazee's certificate of attestation thereon, and with using as genuine the false hibbanamah and certificate.

HELD *by Seton-Karr* and *Jackson, JJ.*, that it was the duty of the Judge, instead of leaving the question as to the forgery of and using as genuine the hibbanamah to be decided by a competent Court, to have tried that question himself.

HELD *by Seton-Karr* and *Glover, JJ.*, that the accused was entitled to an acquittal on the charge of forgery, as there was no evidence at all; and on the second charge, as the evidence was weak, and the probabilities wholly in the prisoner's favor.

HELD by *Jackson, J.*, that when a Judge differs from the Jury, he should pass such a sentence as he would have passed had he agreed with the Jury.

Jackson, J.—THE prisoner has been convicted of the offence of forging a false Certificate of Attestation on the back of a Hibbanamah, purporting to be a transfer of certain landed estate in his favor from his wife, Musst. Ojahunnissa. The sentence passed upon him is one year's rigorous imprisonment.

The prisoner was committed for trial by Baboo Ramkoomar Bose, Deputy Magistrate, of three separate charges:—*First*, the Forgery of the Hibbanamah; *Secondly*, the Forgery of the Dacca Town Kazee's Certificate of Attestation; *Thirdly*, the using as genuine the false Hibbanamah and Certificate.

The Sessions Judge, Mr. Abercrombie, has taken no verdict from the Jury as respects the first and third charges, and he differs from the verdict of the Jury as respects the second charge. To this may probably be attributed the very lenient sentence which has been passed. The Judge should, however, even when he differs from the Jury, inflict such a sentence as he would have passed had he agreed with the Jury. He may take other measures to obtain the release of the accused, if he considers that the accused is not guilty, or that the charge against him is not proved.

I regret to have to record that the enquiries made in this case, both by the Deputy Magistrate and the Sessions Judge, have been most defective and insufficient; and this is the more reprehensible where the Sessions trial has to be conducted with the aid of a Jury. Fortunately, in this case the verdict of the Jury is not final, as the offences of forgery were committed before the Penal and Procedure Codes came into force; and under Act XVII. of 1862 the prisoner is entitled to an appeal on the facts as well as the law.

The proceedings in this case appear to have originated by the prisoner, who charged the complainant, one Bakuroollah, with having, in collusion with the prisoner's wife, set up a false howalah in order to set aside the prisoner's hibbanamah. Upon this Bakuroollah charged the prisoner with forging the hibbanamah to set aside his howalah. Both documents bear old dates. Both parties assert that they have been in possession of the estate in dispute. But the Deputy Magistrate appears to have made no enquiry to ascertain whether Bakuroollah's howalah was really executed at the time and place alleged, or whether Bakuroollah has been in possession under the howalah. The Town Kazee denied that he had recorded the attestation on the prisoner's hibbanamah; and upon this the Deputy Magistrate has jumped to the conclusion that the hibbanamah is the forged document. The sole evidence offered at the trial has been that of Bakuroollah, who deposes that his deed is genuine, and the prisoner's deed is forged; that of the Town Kazee, who, in so many words, deposes that the attestation on the hibbanamah is forged, though there are, the Judge says, suspicious signs of an interpolation in his Registry Book, at the page at which this hibbanamah ought, if genuine, to have appeared, but where another deed is registered; and, lastly, that of a servant of the prisoner, who deposes that he never heard of the hibbanamah. Such evidence is most insufficient to prove the offences charged. The Sessions Judge should not have proceeded with the trial upon it; but have ordered further enquiry. But the prisoner having been committed to the Sessions with these forgeries, the Judge cannot, as he has done, pass over the charges of forgery, and using as genuine the hibbanamah. The Judge, in his address to the Jury, says the question as to the forgery of the howalah or the hibbanamah must be left to be decided by a competent Court. This shows great misapprehension of his duties by the Sessions Judge. There is no Court, but his Court, competent to try that question of the forgery. The prisoner has been committed to his Court for trial, and still he does not try the prisoner.

The case should, I think, be remanded to the Sessions Judge with directions that he will order the Magistrate of the district (as the Deputy Magistrate seems not to understand his duties in this respect) to take up the enquiry, and to make a full and searching investigation into the charges of forgery brought against the prisoner, and also into that brought by the prisoner against the complainant. Bakuroollah's sole and unsupported complaint is no proof against the prisoner, and the Town Kazee's statement should be tested in every possible way. It is an extraordinary circumstance that even Musst. Ojahunnissa was not cited to give evidence before the Sessions Court. In fact, I have never yet seen a case committed to the Sessions so utterly unsupported by evidence as this case, and I must record that I think both the Deputy Magistrate and the Sessions Judge much to blame for their

proceedings on the preliminary enquiry and at the trial respectively.

The Judge should, I think, be required to re-try the prisoner after all the evidence against him has been obtained with the same Jury with which the first trial was held, and to take from them a verdict, either of conviction or acquittal, on the charge on which as yet he has taken no verdict; and as respects the charge on which he has taken a verdict, the proceedings must be again referred to this Court.

In the meanwhile, the prisoner should be placed on bail.

Glover, J.—The forgeries of which the prisoner is accused are alleged to have been committed before the 1st January 1862; consequently, by Section 4 of Act XVII. of that year, the prisoner is entitled to a hearing on the facts of the case, the Jury's verdict notwithstanding.

He was charged—*1st*, with forging a hibbanamah; *2ndly*, with forging the Dacca Kazee's Attestation of Registry on that document; and, *3rdly*, with knowingly using the document as genuine. The Sessions Judge took the Jury's verdict on the *second* count only, that of forging the Kazee's certificate. On that count he sentenced the prisoner to one year's imprisonment, *noting* at the same time that he considered the evidence too weak for conviction.

My colleague would remand the case for further enquiry on all the charges. I concur with him that the case has been improperly conducted from the first; and that the authorities concerned are deserving of censure; but I could not remand the case for the following reasons:—

Firstly.—There appears to me no necessity for re-opening the question of the authenticity of the hibbanamah. The prosecutor Bakuroollah never ventured to say it was a forgery, or that it had not really been given to the prisoner by his wife: his statement was that the document had been, he thought, collusively executed between the two in order to defraud him of his purchased rights. The prisoner is entitled to the benefit of the weakness of the case for the prosecution, and there is neither proof nor assertion that the hibbanamah is a forgery. The charge ought never to have been made.

Secondly.—I think that the evidence regarding the forged attestation is altogether too weak to support a conviction. The Kazee himself gives his evidence in a very suspicious and unsatisfactory way; he is unable to deny that the impression of his large seal is genuine, though he professes ignorance as to how it came there. On referring to page 9 of his Register Book, I find the most palpable evidence that the leaf on which the hibbanamah should have been written has been tampered with; it is an evident interpolation; the place where the new leaf has been gummed on to the narrow remnant of the old is distinctly visible: there is no other leaf in the book so marked; in short, no one that saw the condition of pages 9 and 10 could hesitate for a moment in saying that a new leaf has been interpolated. The evidence in support of the charge is that of the Kazee alone. Against it are the depositions of three witnesses who swear distinctly to the fact of registration by the Kazee himself; these men point out their names on the document as attesting witnesses, and their evidence is in no way rebutted; on the contrary, it receives very considerable corroboration from the appearance of the Register Book at the place where the copy of the deed ought to be, but is not.

I would acquit the prisoner on the *second* count for these reasons.

On the *third* there can, of course, supposing that I am right in crediting the prisoner's story regarding the attestation, be no conviction.

And, therefore, as I said before, I see no reason for remanding his case, but would direct the prisoner's release at once.

Seton-Karr, J.—I concur with Mr. Justice Jackson in thinking that the case has been most carelessly prepared by the Deputy Magistrate, and that the Sessions Judge ought to have known that it was the duty of his Court, and of none other, to decide the question of forgery or no forgery in the first Court.

But it is still the business of the prosecutor to offer some evidence of the forgery, and there is really none offered, and nothing to lead us to suppose that the deed of hibba is other than a deed between man and wife; collusive, it may be, but not forged. Indeed, the evidence of Bakuroollah in reality only amounts to such a charge of collusion.

The turning point in the case is, however, the Registry Book of the Kazee and this functionary's evidence. It is palpable, as Mr. Justice Glover observes, that a fresh page has been introduced in the very page in which the prisoner's hibba, which bears the mark of No. 214 on its face, ought, by his account, to have appeared. Now, it is perfectly incredible that the prisoner could have put the number of 214 on his account by mere

guess, and then that this number, so guessed at, should be found to hit the one single page in the Registry Book which has been manifestly interpolated. It is clear to me that there has been some roguery in the Kazee's Office, and the explanation given by this functionary is altogether weak and unsatisfactory. I am quite satisfied that a Jury, with a proper knowledge of their duties and an ability to weigh evidence, would have at once acquitted the prisoner on this one startling fact of the interpolation alone. The second charge, of course, carries with it the third also.

Holding, then, that the prisoner is fully entitled to an acquittal on this second charge, and that there is no *primâ facie* case to require any further investigation on the first charge, I concur with Mr. Justice Glover, and release the prisoner. The hibba should be restored to the prisoner.

The 21st June 1865.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Cheating or Extortion (by Chowkeedar).

Queen *versus* Ramnarain Chowkeedar.

Referred under Section 434 of the Code of Criminal Procedure and Circular Order No. 18, dated the 15th July 1863.

A chowkeedar, who obtains money from another, either by fraudulent inducement or dishonesty, or by putting that person in fear of injury, is punishable under Section 417 of the Penal Code (Cheating), or Sections 383 and 384 (Extortion), but not for criminal misappropriation of public money entrusted to him as a public servant.

We cannot concur with the Sessions Judge in thinking that this offence should have been punished as criminal breach of trust. On the facts found by the Deputy Magistrate, the offence seems punishable under Section 417 of the Penal Code as cheating, or it may fairly fall under extortion under Sections 383 and 384.

The chowkeedar can never be said to have appropriated public money entrusted to him as a public servant. The money was clearly obtained by him either under fraudulent inducement or dishonesty (Section 417), or by his putting Haro Gwalini in fear of injury, and so inducing her to deliver up money to him (Section 383). In either view we see no reason for remanding or altering the conviction, though the punishment seems inadequate to the offence.

The 21st June 1865.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Trespass (false charge of).

Sibnarain Paul and others

versus

Ram Rutton Dutt, Sodagur Singh, and others.

Criminal Reference made by the Officiating Sessions Judge of Rajshahye in his letter No. 291, dated the 8th instant.

A charge of trespass against persons in possession of land decreed to another, whether notice of the decree has been given to the alleged trespassers or not, is not necessarily "frivolous, vexatious, and false."

On the facts recorded, and on the finding come to by the Joint Magistrate, we do not gather that the lands, in regard to which the case occurred, were other than a part of the lands duly awarded to Anundo Mohun Mittra by a decree of the High Court, and duly delivered over to him in execution of decree. The Joint Magistrate nowhere says that any encroachment had been made by Anundo Mittra on other lands of the defendant, and over and above the lands awarded by the civil decree. In this state of things, what the Joint Magistrate says about some notice being due to the defendant on the part of the person successful in the Civil Court is irrelevant. This being so, the defendants are shewn to have trespassed on lands awarded by a decree to the employer of the plaintiff Nawai Mundul, and to have given a foundation for the charge laid ; and, though the proceedings of the defendants do not appear to have been characterized by any violence or extravagance, there is, on the other hand, nothing whatever to justify the Joint Magistrate in terming the complaint "frivolous, vexatious, and false," and still less to warrant his inflicting a fine of 25 rupees.

We, therefore, hold that the complaint of Nawi had quite grounds sufficient to warrant its institution, and that the imposition of a fine was unwarranted and illegal, and we hereby remit the same. We observe that this reference has not been submitted in the form prescribed by Circular Order No. 18 of 15th July 1863.

The 21st June 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Contempt of lawful authority of public servant—Mock bidding for lease of Ferry sold by Magistrate.

Queen *versus* Reazooddeen and others.

Reference made by the Sessions Judge of Tipperah, under Section 434 of Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

A person is guilty of contempt, under Section 185, Penal Code, by bidding for the lease of a ferry sold at public auction by the Magistrate, and failing to complete the sale.

THE parties in this case have been punished under Section 185 of the Indian Penal Code, which enacts that a party bidding at a sale of property, held by lawful authority of a public servant, and not intending to perform the obligations under which he lays himself by such bidding, shall be punished, &c., &c.

The parties bid for the lease of a ferry sold at public auction by the Magistrate, and failed to complete the sale. The Magistrate rightly or wrongly found, on the evidence, that they had done so in the hope of obtaining the lease on a re-sale at a lower rate, and fined them rupees 10 each. The Sessions Judge thinks that the law does not contemplate a sale of this kind, but only a sale of corporeal property, for so we gather from his letter. But to answer the question put by him, it is necessary to look to the object of this Chapter of the Penal Code, which is headed "Contempts of the Lawful Authority of Public Servants."

Now, we think, a party can equally show contempt by bidding for the lease of a ferry put up to public auction by a Magistrate, as he can by bidding for any corporeal property, not intending to perform the obligations under which he lays himself by such bidding. It is his intention at the time of bidding, and not the nature of the thing to be sold, which constitutes the offence. We think, therefore, that, if the intention were proved, the Magistrate's order, under Section 185, was correct.

The 21st June 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

No Recognizances (from persons acquitted).

Queen *versus* Anund Chunder Chuckerbutty and Hur Chunder Chuckerbutty.

Recognizances are not necessary from persons acquitted by the Sessions Judge.

Two references have been made by the Sessions Judge of Backergunge under Section 434 of the Code of Criminal Procedure regarding the parties noted in the margin, * who were sentenced to a fine of rupees 1,000 for the offence specified in Section 155 of the Indian Penal Code, and were further bound down in recognizances of rupees 1,000 to keep the peace for one year. As the parties have been acquitted by the Sessions Judge, the charge against them not being proved, we concur with him in thinking that there are no grounds for requiring these recognizances, and, under the provisions of Section 404 of the Code of Criminal Procedure, we reverse the order of the Magistrate requiring them.

* Hur Chunder Chuckerbutty and Anund Chunder Chuckerbutty.

The 21st June 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

District Municipal Act—Levy of fines by Joint Magistrate—Record of proceedings—Obstructions—Not keeping ground clean.

Reference made by the Sessions Judge of the 24-Pergunnáhs under Section 434 of Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

A Joint Magistrate, though Vice-Chairman of a Municipal Committee, can impose fines under Act IV. of 1864, B. C.

The Joint Magistrate should make a record of his proceedings before passing sentence.

The obstruction of a drain by a tree blown down by the Cyclone is not an obstruction within the meaning of Section 57 of that Act.

The owner of ground is answerable under Section 67, whether his ground was made dirty by himself or another.

The District Municipal Act is silent as to the authority by whom fines under the Act are to be imposed; but we think there can be no doubt that the Magistrate is the proper authority, and, therefore, the Joint

Magistrate, though Vice-Chairman of the Municipal Committee, is competent to impose fines on charges being brought and proved before him. We agree with the Sessions Judge that the Joint Magistrate should make a record of his proceedings, taking down in writing the statement of the party charged, and, when necessary, the evidence against and for the accused; but if, on visiting a locality, the Joint Magistrate has ocular demonstration that an offence has been committed, we think it would be sufficient for him to know and to record what the party charged with the offence had to say, and then proceed to pass sentence.

With regard to the fine imposed by the Joint Magistrate, under Section 57 of Act III. of 1864, Bengal Legislature, we think the Joint Magistrate's order illegal as the tree which obstructed the drain was blown down by the Cyclone, whereas the Section quoted refers to some obstruction raised purposely by a party. It is questionable whether the Municipal Committee were not bound to remove this obstruction at their own cost. If the party wished to retain the wood, he would be bound to remove it after due notice, and, if he failed to do so, the Committee might do so.

We remit this fine.

We think the Joint Magistrate was right as regards his orders under Section 67 of the Act. It is no valid excuse for a man, who is bound by law to keep his ground clean, to say: "I did not make it dirty, but somebody else did."

The 24th June 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr,

Judges.

Absconding parties—Proclamation and attachment of property (not authorised for offences punishable with 6 months' imprisonment)—Sections 183 and 184, Criminal Procedure Code.

Queen *versus* Muddun Mohun Podar.

Appeal against the order of the Sessions Judge of Backergunge, affirming that of the Joint Magistrate.

Sections 183 and 184, Criminal Procedure Code (proclamation and attachment of property of absconding parties), do not apply to offences punishable with imprisonment extending to six months only.

There is no rule which requires a Magistrate to satisfy himself that a party has absconded, before issuing a proclamation; but the party, on suing to recover his property, may prove by evidence that he had not absconded.

Before a Magistrate proceeds to declare attached property forfeited, he should take evidence to prove compliance with the formalities laid down by law with regard to proclamation.

In this case two objections are taken:—*1st*, that the offence with which the petitioner is charged being punishable only with fine commutable, under Section 69 of the Indian Penal Code, to imprisonment not under any circumstances exceeding six months, the Magistrate acted contrary to law in proceeding against him under the provisions of Chapter XIV. instead of Chapter XV. of the Code of Criminal Procedure; *2ndly*, that the petitioner did not attempt to evade process, and the issue of the proclamation under Section 183 has not been made in the manner required by law.

The petitioner is charged under Sections 154 and 155 of the Penal Code, and a warrant was issued by the Joint Magistrate on 5th September for his apprehension. The return of the Inspector of Police was to the effect that the petitioner was then at Burrisaul, and he requested instructions whether the warrant should be sent there to be served. On 5th September the Joint Magistrate issued a proclamation under the provisions of Section 183 of the Code of Criminal Procedure, and at the same time directed the attachment of the petitioner's property, which, on the 12th October, the Joint Magistrate declared to be at the disposal of Government, as the petitioner failed to appear within the time limited in the proclamation.

The first objection raised is one of law. The petitioner urges that the offence described in Sections 154, 155, and 156 of the Indian Penal Code is punishable with fine only commutable by Section 67 to imprisonment for six months, if the fine exceed 100 rupees; that for offences punishable by a Magistrate with imprisonment for a period of more than six months, under Chapter XIV. of the Code of Criminal Procedure, the provisions of Chapter XII. for causing the attendance of the accused are made appealable by Section 249; but that the provisions of that Chapter are not extended to offences punishable under Chapter XV. with imprisonment extending to six months. In such cases the usual course is, first a summons, and then a warrant, or, should the circumstances require it, a warrant is issued in the first instance; if the accused be not apprehended under the warrant, the only course to be taken

is for the Magistrate to re-issue it; but he is not empowered, under the law, to take further proceedings for causing the attendance of the accused, such as proclamation and attachment, as the provisions of Sections 183 and 184, Chapter XII., have not been extended to cases triable under Chapter XV., though other Sections of that Chapter, to secure the attendance of witnesses, have been—the Legislature showing by the marked omission that it did not intend to extend the provisions of Sections 183 and 184 to offences punishable with imprisonment up to six months.

High Court to Judge of Bhaugulpore, 28th April 1865.

It has already been ruled by the Court, on a reference made by the Judge of Bhaugulpore, noted in the margin, that the provisions of Sections 183 and 184 do not extend to cases triable by a Magistrate under Chapter XV. of the Code of Criminal Procedure, and it appears to us that the Legislature purposely made the omission, considering that for cases falling under this Chapter, which are generally of a petty nature, and where the usual course of obtaining the attendance of the accused is by summons, it was enough to enforce that attendance by the further process of a warrant, and ordinarily the issue of a warrant is sufficient for that purpose. As, therefore, the offence with which the petitioner is charged is punishable by fine commutable to imprisonment extending to six months, we think the provisions are not applicable to this case, and all proceedings taken under them must be quashed.

It is urged, further, that, looking at the return made by the Police Officer, it is clear that there was no attempt, on the part of the petitioner, to abscond. Both the Magistrate and Sessions Judge have found, as a fact, from the evidence and the acts of the petitioner, that he did endeavour to abscond. Though the Police Officer's return is made in language which might lead to the supposition that the petitioner had gone to Burrisaul in the ordinary course of his business, yet, if the Magistrate were satisfied that he intended to abscond to avoid the service of the warrant, he had authority to issue the proclamation, if this had been a case in which such procedure were authorized by law. The law does not lay down any rule which a Magistrate must take to satisfy himself that a party is absconding before issuing a proclamation; but, of course, it is open to the party suing to recover his property, under Section 185 of the Code of Criminal Procedure, to prove by evidence that he had not done so.

Then, as regards the objection, that the proclamation was issued without due formality, we observed that the law (Section 183) requires that "the proclamation shall be publicly read in some conspicuous place of the town or village in which such person usually resides, and shall be affixed on some conspicuous part of the ordinary place of abode of such person, or on some conspicuous place of such town or village," and that "a copy of the proclamation shall also be affixed on some conspicuous part of the Court-house of the Magistrate." The law has laid down the above rules as necessary formalities for the due issue of a proclamation; and before the Magistrate proceeds to declare attached property to be at the disposal of Government, he should take evidence to prove that these formalities have been duly complied with. The return of a Police Officer, though sufficient to enable the Magistrate to do certain acts, is, we think, insufficient to authorize his inflicting a heavy penalty on the accused; for such, no doubt, is the forfeiture of property, and, therefore, the fact of the issue of the proclamation with all formalities should be proved like any other fact: for the object of the proclamation being to inform the accused that his attendance is required; the object of these formalities is to ensure a due proclamation of that proclamation, so that the accused may not be able to say that neither he nor any of his people were aware that his attendance was required by the Magistrate. In this case, however, the petitioner admits that he was aware of the issue of a warrant, and applied to the Magistrate to appear by agent before the period entered in the proclamation had expired, and in time to admit of his appearing in person when that application was rejected, so that he could not plead ignorance; and, had this been a case to which the provisions of Sections 183 and 184 were applicable, we should have rejected the appeal. As it is, we must reverse the orders of both the Lower Courts.

The 26th June 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Witnesses for the defence (examination of).

Referred under Section 434 of Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

Queen *versus* Abdool Setar.

An accused person is entitled to have the witnesses, named in his defence, examined.

READ a reference from the Sessions Judge of Hooghly, dated 19th instant.

We entirely concur with the view taken of this case by the Sessions Judge. The accused in the case of the Queen *versus* Abdool Setar is clearly entitled to have the witnesses (whom, we observe, he distinctly named in his defence) examined.

The provisions of Circular Order No. 18 of the 12th December 1861 do not apply to this case. The present case was not one necessarily triable in the Sessions Court, and the accused had, therefore, no opportunity of citing witnesses at a later stage of the case and before a higher tribunal. The order and sentence passed by the Deputy Magistrate is annulled. The records of the case must be returned with directions that the witnesses for the defence of the accused be examined, and a proper order passed.

The 26th June 1865.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Theft in dwelling-house, &c.—Whipping.

Queen *versus* Junghoo Khan and Tussuduk Hossein.

Committed by the Assistant Magistrate, and tried by the Sessions Judge of Patna, on a charge of "Theft."

Whipping may be substituted for any other punishment for the offence of theft in a dwelling-house, &c.

THIS trial was conducted with a Jury.

The petition of appeal raises no point of law.

The conviction and sentence appear to be legal, and, under all the circumstances, the punishment awarded is not too severe. The appellants were convicted of seven distinct offences under Section 380 of the Indian Penal Code. The infliction of stripes under the provisions of Section 2, Act VI. of 1864, in lieu of any other punishment, is legal for an offence defined by Section 380 of the Indian Penal Code. It was not an additional punishment.

The appeals are rejected.

The Sessions Judge should have sent a copy of his charge to the Jury with the petition of appeal.

The 26th June 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Dismissal of case by Deputy Magistrate for default.

Queen *versus* Chundrai Sikdar and others.
Referred under Sections 347 and 435 of the Code of Criminal Procedure.

The Deputy Magistrate did not act illegally in dismissing the case when the complainant did not appear on the day fixed.

IN this case we concur with the Sessions Judge that Section 180 of the Criminal Procedure Code does not apply.

The Deputy Magistrate did dismiss the case, because there was no ground for proceeding with it. The Section under which the case was dismissed, because the complainant did not appear with his witnesses on the day appointed, appears to be Section 259; and there can be little doubt that, under the strict letter of the law, the Deputy Magistrate was justified in dismissing the case under that Section when the complainant was not present, though there had been no question, till then, of the appearance of the accused.

We think that the Deputy Magistrate would have exercised a sounder discretion had he waited a short time to see if the witnesses would appear, or if he had not dismissed the case until the close of the day; but, looking to the statement of the complainant, it does not seem that the charge was of an aggravated nature, or that any great violence had been exercised on the complainant.

Had the charges been of a kind exclusively triable by the Court of Session, the Sessions Judge might himself have dealt with the case under Section 435 of the Criminal Procedure Code. The offences charged were not necessarily triable at the Sessions. But charges under either Section 342 or 347 of the Penal Code are triable by the Magistrate, and, under all the circumstances, we do not think that anything more need be done. The Sessions Judge should furnish the Deputy Magistrate with a copy of our opinion for his guidance in future.

The 27th June 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Abetment—Issue of false certificate of Summons.

Queen *versus* Hissamuddeen.

Committed by the Magistrate of Bancoorah, and tried by the Sessions Judge of West Burdwan, on a charge of abetment of issuing a certificate required by law to be given, knowing it to be false on a material point.

Abetment of the issue of a false certificate of summons. Although there was no chowkeedar in the village of the name appearing on the receipt acknowledging due service, the prisoner was acquitted in the absence of proof of guilty knowledge of belief, it being probable that he (an utter stranger in the village) was deceived by the villagers.

THIS is a novel case, and, as such, I have very carefully perused the whole of the proceedings in the original vernacular.

The prisoner is a peadah of the Bancoorah Collectorate. It appears that he had held that office for six or seven months prior to the present trial. The facts of the case appear to be briefly as follows. One Motee Loll Roy brought a suit for arrears of rent for the years 1268, 1269, and 1270, amounting to rupees 117-10-18-1, against Gopal Pari and Rooplall Pari. The issues raised in the suit upon the pleadings were: *First*—Is the jumma of the defendants payable in sicca or Company's rupees? *Secondly*—Is the arrear or any portion of it due or not? The Assistant Collector dismissed the suit, holding that the jumma was payable in Company's rupees, and that the arrears were not due; special damages were awarded to the defendants under the provisions of Act VI. of 1862. In appeal the decision of the Assistant Collector was affirmed.

It appears that, in the answer of one of the defendants, or Rooplall Pari, before the Assistant Collector, the said party averred that the summons had not been served upon him personally, or affixed to the door of his house, and that he should have known nothing of the suit had he not casually heard of its institution. He further alleged that there was no such chowkeedar in the village in which he resided as Modoo Mytee, whose name appears as a witness on the receipt, acknowledging the due service of the summons, the chowkeedar of the village being one Seeboo Dome.

Upon this the Assistant Collector held a proceeding, and made over the prisoner, the peadah Hissamuddeen, to the Magistrate.

The Magistrate, Mr. Wells, after taking the answer of the peadah, and evidence to the fact that there was no chowkeedar by name Modoo Mytee, committed the prisoner to take his trial on the following charge before the Sessions Judge:—"With voluntarily causing the Nazir of Bancoorah Collectorate to sign or issue a certificate required by Section 46 of Act X. of 1859, knowing that such certificate was false in a material point; and that he has thereby committed an offence punishable under Section 197 of the Indian Penal Code, and has committed an offence punishable *(sic in orig.)* under Section 109 of the Indian Penal Code within the cognizance of the Court of Session."

As the Magistrate's grounds for committing the prisoner are very brief, I extract them:

"There can be no question, I think, that the accused never visited the village or served the process, which he gave the Nazir to understand he had duly executed."

The Sessions Judge, Mr. W. T. Tucker, found that the offence established against the prisoner was—

"Abetment of the issuing of a certificate required by law to be given, knowing such certificate to be false in a material point."

The sentence passed is one year's rigorous imprisonment.

The gist of the offence in this instance is clearly the intention of the prisoner. The question is, did the prisoner know or believe that the certificate of service of summons which he filed was false in a material point? I think that the prisoner is entitled to an acquittal. It is not disputed that he was an utter stranger in the village in which the parties to the Act X. suits resided. It is also clear that he is a peadah of some few months' standing, knowing nothing of the parties; he goes to the village, the house of the defendant in the Act X. suit is pointed out to him by the plaintiff—a house said to be the residence of the defendant. The defendant is not found at home; the prisoner affixes the summons to the principal door of the homestead, and gets a receipt signed by a party styling himself chowkeedar. It may be that there is no chowkeedar in the village of the name of Modoo Mytee, but that there is a Modoo is admitted. Nothing is, therefore, more probable than that the peadah, the prisoner, was told by somebody on

behalf of the plaintiff, who wished to have the suit tried *ex parte*, that the witness Modoo was a chowkeedar. Not being able to satisfy myself of the guilty knowledge or belief of the prisoner, I would acquit him. The papers must be submitted to my colleague, Mr. Justice Seton-Karr.

Seton-Karr, J.—It seems very remarkable that, after all the alleged non-service of the summons, the defendants in the rent-case did appear, and did answer the plaintiff's claim.

I distrust the statement that the summons was never served, and that they only heard by chance of the rent-case. Now, the statement is the sole foundation for the trial and eventual conviction of the peon for abetment of the issue of a false certificate.

I think the peon's story consistent and probable, and at any rate this is a case in which he is fully entitled to any reasonable doubts ; my own belief is, that he served the summons which he had no interest in not serving, and was deceived by the villagers, who gave him false names. The prisoner is released.

The 29th June 1865.

Present :

The Hon'ble F. A. Glover, *Judge.*

Records of previous convictions (to be put in at close of trial).

Queen *versus* Shiboo Mundle.

Committed by the Deputy Magistrate of Burdwan, and tried by the Sessions Judge of West Burdwan, for theft, &c.

Records of previous convictions should not be put in until the close of the trial, as they can only be used after conviction in determining the measure of punishment.

THIS is a clear case. The prisoner was caught making off with the stolen bullocks, and, on being questioned about them, made his escape, leaving the animals behind him ; he was followed, and again questioned, but again he contrived to make off. His defence is enmity—a plea not in the least established. Against him is the abundantly proved fact, that he was found making off with the bullocks, which had been stolen some days previous, and that he not only refused to give any account of the animals, but ran off directly he was questioned.

He appears to have been once before imprisoned for cattle-stealing. I see no reason, therefore, to interfere with the conviction under Section 411 of the Penal Code, and reject the appeal.

I remark, however, for the Sessions Judge's future guidance, that records of previous convictions should not be put in until the trial is concluded. The previous conviction of the prisoner for cattle-stealing could have been no proof against him in the present case, and could only have been used after conviction in determining the measure of punishment.

The 4th July 1865.

Present :

The Hon'ble C. Steer, *Judge.*

Destruction of a valuable security—Tearing a pottah.

Queen *versus* Nittar Mundle.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of defacing a document purporting to be a valuable security, under Section 477 of the Indian Penal Code.

The tearing up of a pottah is the destruction of a valuable security within the meaning of Section 477 of the Penal Code.

THE evidence establishes that the prisoner took and tore up a pottah, and that is a document which is a valuable security. The conviction and sentence under Section 477 is legal, and there is no ground for the appeal.

The 6th July 1865.

Present :

The Hon'ble F. B. Kemp, E. Jackson, and F. A. Glover, *Judges.*

Murder—Culpable Homicide not amounting to Murder.

Queen *versus* Beria Bazikur and another.

Committed by the Assistant Magistrate, and tried by the Sessions Judge of Rungpore, on a charge of Culpable Homicide, under Section 304 of the Indian Penal Code.

The Sessions Judge, having found the prisoners guilty of striking the deceased with the knowledge that the act was likely to cause death—in other words, guilty of murder—convicted and punished them for culpable homicide not amounting to murder. Case remanded for a new trial (*Jackson, J.*, dissenting).

Glover, J.—THE Sessions Judge has convicted the prisoners of culpable homicide not amounting to murder, under Section 304 of the Penal Code, and has sentenced them to five years' rigorous imprisonment.

This conviction is opposed to the evidence and to the Sessions Judge's own summing up. He finds the prisoners guilty of striking the deceased with "the knowledge that the act was likely to cause death." This is specially the meaning of Clause 4 of Section 300 of the Penal Code, and, under that Section, the crime held by the Sessions Judge to be proved against the prisoners is not culpable homicide not amounting to murder, but murder itself.

It has already been ruled by this Court in the case of Jobur Mahomed and another, dated 28th December 1864, that, where a conviction is, from the Sessions Judge's own showing, erroneous in law, the case should be remanded with directions to record a legal finding on the evidence, and to pass sentence in accordance therewith ; as this Court, although empowered by Section 419 of the Code of Criminal Procedure to alter the finding and sentence of the Sessions Judge, could not impose the lightest of the punishments allowed by law for the crime of which the prisoner had been really convicted without enhancing that already imposed.

Following this precedent, I think that this case should be sent bak to the Lower Court, with directions to come to a legal finding on the evidence which the Judge admits to be trustworthy, and to pass such a sentence as the law directs. In the present case, the prisoners have been found guilty of murder, although the conviction and punishment have been for culpable homicide not amounting to murder.

Jackson, J.—I would not remand this case. There was an altercation between the prisoners and the villagers. The prisoner's witnesses say that, as they were passing along the road (a large encampment of women and cattle), the cattle strayed with the villagers into the villagers' field. The villagers state that the prisoners and their women went into the field to eat the sugar-cane, and that, in the dispute which ensued consequently, the prisoners struck the blows, one of which caused the death of one of the villagers. The Civil Surgeon's evidence proves that only two blows were struck, but that one of them was very severe, penetrating to the brain, and fracturing the skull. It does not appear in evidence which of the prisoners struck this blow, and the witnesses all depose that it was a blow with a *lattee*, and not with any cutting instrument. There is no proof that the prisoners received any provocation before they assaulted the villager who was killed. The villagers will not mention that circumstance, and the prisoners deny that they killed the man, or had any dispute with him personally. But, looking to all the circumstances that there were only four men belonging to the prisoner's party, and a very large number of women and cattle, I doubt if the prisoners would have attacked the villagers unless they had been provoked in some way. Had the Sessions Judge made a more careful examination of the prisoner's witnesses, I feel certain this would have been elicited.

However this may be, I am not satisfied that the prisoners who struck the blow either intended to cause death, or struck it with the intention of causing such bodily injury as was likely to cause death.

We must look to all the circumstances of the case to see what the prisoner's intention was, and there is no evidence whatever upon which it is satisfactorily proved to my mind that the prisoners in any way intended to cause death or bodily injury sufficient to cause death. But the prisoner, who struck the blow which killed the villager, must have known that a blow on the head with a *lattee* was likely to cause death ; and as he chose to run the risk of inflicting this blow, he committed the offence of culpable homicide, and his companion, who was present abetting in the assault, committed the same offence. As it is not certain which prisoner inflicted the blow which caused death, I would reduce the sentence of three years' imprisonment. It does not appear to me to be a case calling for severe punishment.

Kemp, J.—I entirely concur with Mr. Justice Glover. This appears to me to be a very bad case. The two prisoners, who belong to a wandering tribe, gipsies, entered a sugar-cane field for the purpose of plundering it. The villagers, and amongst them the deceased, naturally remonstrated. The prisoners then and there set upon the villagers, and killed the deceased ; his skull was fractured. The Sessions Judge, Mr. Fowle, in his remarks, observes "that the Court cannot but look upon such violent use of a heavy weapon like a bamboo in any other light than an act done with the knowledge that it was likely to cause death." I cannot understand how the Sessions Judge could convict of any offence short of murder, when he was of opinion that the act done was so imminently dangerous that the knowledge that it was likely to cause death must be inferred. (*See* Explanation, Section 300 of the Indian Penal Code.)

My learned colleague, Mr. Justice Glover, proposes to send back the case in order that the Judge may come to a legal finding.

I would, acting as a Court of Revision, under Section 405, order a new trial. The prisoners have not pleaded to the graver charge of murder; the charge must, therefore, be remanded, and the provisions of Sections 244, 245, 246, and 247 of the Code of Criminal Procedure carefully attended to. After recording the pleas of the prisoners, the Judge will pass a legal sentence.

Glover, J.—After reading the remarks of Mr. Justice Kemp, I concur with him in remanding the case for a new trial.

The 7th July 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,

Judges.

Murder—Culpable homicide not amounting to Murder.

Queen *versus* Mahomed Elim Abdool Kurreem and Abdool Ghunee.

Committed by the Magistrate, and tried by the Sessions Judge of Sylhet on a charge of murder.

The absence of premeditation will not reduce the crime for murder to culpable homicide not amounting to murder.

Glover, J.—THE evidence in this case has been recorded by the Sessions Judge in a very meagre and unsatisfactory way; and had the matter been one of any difficulty, I should have felt obliged to remand the case for a more complete enquiry. There can be no doubt, however, that the deceased met with his death at the hands of the prisoners, and the only point for consideration is, of what degree of homicide the prisoners are guilty?

The Sessions Judge has convicted them under Section 304 of the Penal Code, on the ground that the killing was not premeditated; but in this he has committed an error of law. The Penal Code nowhere makes premeditation a necessary concomitant to murder. Whatever the motive may be, or whether or not any motive whatsoever be discoverable, the sole point for enquiry is, whether the person inflicting the injury did so with the knowledge that it would cause death, or that it was likely to have that effect; if he acted with that knowledge, the crime, unless specifically exempted, comes under none of the exceptions, and is culpable homicide under Section 300, in other words "murder."

Now, in the present case, the Sessions Judge has gone simply on the want of premeditation, adding, curiously enough, the remark that the deceased gave the prisoners no provocation. It is proved beyond question, by the medical evidence, that the injuries inflicted on the deceased were of a most desperate nature; the bones of the skull were driven into the brain, and the weapons used were heavy bamboo banghy sticks, weighing nearly 5 lbs. a piece. The nature of the injuries shows, conclusively, that the persons inflicting them must have, at the least, known that they were likely to cause death; and all consequences must be presumed against men who beat another's skull into numberless pieces with weapons that might naturally be expected to produce such a result.

The crime, as proved by the evidence, appears to be nothing short of murder under Section 300 of the Penal Code; and as the Judge has convicted of the lesser offence under Section 304 on a mistake of law, I think that the case should be sent back for him to come to a legal finding.

This Court, as a Court of Appeal, cannot enhance any sentence; and, therefore, although I could alter the conviction for culpable homicide not amounting to murder to murder itself, I could not interfere with the sentence, or pass either of the only sentences allowed by law. I think, therefore, that the Judge should be directed to find on the evidence whether the killing was done with the knowledge of likelihood that it would cause death; if he finds it so, and that none of the exceptions apply, he should convict the prisoners of murder, and pass sentence either of death or of transportation for life.

The papers must be laid before another Judge.

Kemp, J.—I quite concur with Mr. Justice Glover, that the evidence is amply sufficient to sustain a conviction of "murder."

The cranium of the deceased was completely smashed, and several pieces of bones were buried in the substance of the brain. The Medical Officer, in answer to a question as to the probable number of blows inflicted, replied: "The whole head was a mass of "bruises; it is impossible to say how many "blows were given."

It is in evidence that the deceased remonstrated with the three prisoners, because they cut a crop belonging to him. The prisoners, a father and his two sons, then and there, set upon the deceased, and beat

him with heavy sticks in a cruel manner. It may be that the act was not premeditated, and this fact may, doubtless, be taken into consideration in awarding punishment; but the absence of premeditation will not reduce the crime from murder to culpable homicide not amounting to murder.

Culpable homicide is murder, unless it comes under some one of the exceptions laid down in the Penal Code. This case does not come under any of the exceptions. The prisoners, without any provocation, the Sessions Judge admits, used heavy sticks—all the blows were aimed at the head of the deceased, whose skull was literally smashed to pieces; the prisoners must have known that their acts were so imminently dangerous that they must, in all probability, have caused death or such bodily injury as was likely to cause death; they are, therefore, clearly guilty of murder, and nothing short of murder.

As a Court of Revision, I would order a new trial. The prisoners were charged with culpable homicide not amounting to murder, and they have not pleaded to the graver charge. The Sessions Judge must amend the charge under Section 244 of the Code of Criminal Procedure. The trial may be immediately proceeded with, unless the Sessions Judge be of opinion that the accused persons will be prejudiced in their defence by so doing; in that case, the Sessions Judge will proceed under Section 246 of the Code. The accused may be permitted to re-call and examine any witnesses for the prosecution, who may have been examined on the first trial. On the completion of the trial, the Sessions Judge will pass a legal sentence.

Glover, J.—After reading the remarks of Mr. Justice Kemp, I concur in ordering a new trial.

The 10th July 1865.

Present:

The Hon'ble W. S. Seton-Karr, *Judge.*

Prisoner charged with graver offence, but convicted of lesser offence.

Queen *versus* Satoo Sheikh.

Committed by the Assistant Magistrate of Bongong, and tried by the Officiating Sessions Judge of Nuddea.—Crime charged, culpable homicide amounting to murder.

A Jury may ignore the graver charges on which a prisoner is tried, and find him guilty of a lesser one on the evidence.

THE appeal appears to be out of time. But this is one of those very common cases in which a husband beats his wife, because his meal is not ready, in such manner as to cause her death by rupture of the spleen.

The Jury, on the evidence which is clearly explained by the Sessions Judge, ignored the graver charges, and found that the prisoner was guilty of grievous hurt; similar findings and convictions have been upheld in very similar cases by the High Court.

There is nothing, as it appears to me, illegal or incorrect in such a finding on the evidence as reported; and certainly there cannot be the slightest ground for any mitigation of the moderate punishment inflicted.

I reject the appeal.

The 11th July 1865.

Present:

The Hon'ble W. S. Seton-Karr and G. Campbell, *Judges.*

Culpable Homicide not amounting to Murder—Affrays respecting land—Right of private defence of property—Unlawful Assembly.

Queen *versus* Mitto Sing, Ghoghan Sing, Nilkunt Sing, Begum Sing, Nuck Ched Sing, Moorut Sing, Sheho Seehoy Sing, Beda Sing, Kerut Sing, Gheema Sing, and Jhumun Sing.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Patna.

In an affray respecting land one of the aggressive party was killed. The prisoners, who were exercising the right of private defence of property, were acquitted by the Jury of culpable homicide, but convicted of rioting. HELD that the prisoners, not being legally guilty of culpable homicide, were not legally guilty of any other offence coupled with rioting, and, not being rioters, or members of an unlawful assembly, could claim the benefit of Section 104, Penal Code.

Campbell, J.—THIS case arises out of an affray respecting lands between two parties of armed Rajpoot villagers in a village in Behar.

One of the party opposite to that of the prisoners was killed, and certain persons (Shunkar Sing and others) have already been convicted of culpable homicide, and sentenced to one year's imprisonment; it being the opinion of this Court (by whom the sentence was mitigated) that, under the circumstances of aggression by the other party, the offence was not of a deep dye.

The present appellants, who are of the same party as Shunkar Sing, have been put on their trial in the case now before the Court on charges of culpable homicide and rioting. It does not seem to be suggested that any of them struck the blow which caused deceased's death (which evidence, I think, attributes to some of the persons

before convicted); but the case for the prosecution is that, as the actual perpetrator and the present prisoners were banded together for the commission of the offence, they are liable for the results. The case was tried by Jury. The charge of the Judge shows that he had gone into the case in a thorough and complete way, such as alone can fairly secure the best use of the Jury system. If every case was as thoroughly sifted by Judges, much advantage might be derived from the use of Juries. He has brought out the questions of facts proper to be left to the Jury, and has, in good faith, left them entirely to the Jury in a way which might serve as a model for such cases; and, especially, he has addressed himself of that which I have before observed to be too frequently neglected in affray cases, *viz.*, to find which party was the aggressor, and whether either exercised wholly or to some degree a right of private defence. To ascertain this, and to guide his judgment in regard to the severity of the sentence, he had, before taking the verdict of guilty or not guilty, put some specific questions to the Jury. This practice is, I think, in such a case, worthy of all commendation. It is not expressly provided for in the Code of Criminal Procedure, but there is nothing there inconsistent with such a practice; and, as I have had considerable practical experience of trial by Jury in England (though more in civil than in criminal cases), I may add that the practice of putting specific questions to the Jury is not uncommon there.

In this case, then, the Jury substantially find that the riot was "the result of the deliberate collections of men by both parties;" further, that the scene of the riot was Shunkar's field, and that the opposite parties were the aggressors. (It seems that there had been litigations between the parties about the field, and that Shunkar's right and possession had been legally decided in his favor.) Upon the facts, and the Judge's charge, they acquitted the prisoners of culpable homicide, and convicted them of rioting.

The point urged by the appellant's pleader is that, as the prisoners have been acquitted of the culpable homicide, and the other party are found to be the aggressors on the field of their party, they were not members of any unlawful assembly, but acted in self-defence, and that on this point the Judge mis-directed the Jury. After hearing the pleader for the prisoners, and the Government pleader in reply, I think that this objection can be sustained.

The charge of the Judge was in substance (as regards this point of law) as follows:—"If you think that the prisoners' party were the aggressors, then you must find all those who were present banded together for a common unlawful object, and of which homicide was the probable and actual result, guilty of culpable homicide. But if you think that the opposite party were the aggressors, and that the prisoners and others turned out armed and prepared to fight in defence of their property, it cannot be said that the turning out of an armed force of fifty men is a reasonable act in exercise of the right of private defence, and, in that case, you might convict them of the minor charge of riot only." Acting apparently on this last suggestion, the Jury convicted of riot.

Now, the question is not, whether there was a reasonable exercise of the right of private defence, but whether there was a lawful exercise of that right. The law is this (Sections 99 to 104 of the Penal Code), that in certain circumstances (of which the mere defence of property against trespass is not one) the right of private defence extends to causing death; and that, in other cases, the right extends to causing any harm short of death, subject in both cases to the general limitations of Section 99. Now, as in this case there was no right to cause death in defence of the property, the parties who killed the deceased are no doubt guilty of culpable homicide. I also think it may well be that, if several parties band together, and so act in defence of property that the unlawful causing of death is a natural and probable result, and death is, in fact, so caused, it would be very dangerous to hold otherwise than that they are all responsible and guilty of culpable homicide of a low degree though it be. It may, therefore, be that, if the Judge had so charged the Jury, the facts might have been found such as to justify a verdict of guilty of culpable homicide against the prisoners. Those who indulge in such an excessive private defence do so at their own risk. But if no death actually is caused, then the right of private defence has not been exceeded. Are those banded for the defence guilty of any crime? In this case the prisoners have been acquitted of the culpable homicide, which places them in the same position as if there had been no culpable homicide. Can they be convicted of rioting, because there occurred a culpable homicide of which they are not guilty? I think not. In fact, they have not (as the finding stands) exceeded the right of private defence.

But are they guilty of unlawful assembly and rioting as a separate question? See the definition of Unlawful Assembly (Section 141). The object of the assembly must be one of those specified. It must be either to commit some act which would be an offence independent of the assembly (and, as the only offence of this kind was the culpable homicide, the prisoners are found not guilty of assembling with that object), or it must be by criminal force to take or obtain possession of any property, or to enforce any right or supposed right. I think that the latter provision applies to an active enforcement of a right not in possession, and not to the defence of a right in possession. Therefore, I cannot see that the mere assembling in defence of property is an unlawful assembly, unless the persons assembling both intend to commit (or to run extreme risk of committing) and actually do commit culpable homicide. In short, my view is that, when parties in good faith act in defence of property, whether they be many or few, and whether they be all the actual owners, or whether some of them be assembled at the request of the owner in possession of the property, they must be guilty of culpable homicide or of nothing. In this view I would quash the conviction as illegal, and release the prisoners. The case must go before another Judge.

I would add that it has been suggested by the Government Vakeel that the sentence cannot be disturbed without sending for the whole file; whereas, I have before me only the charge to, and finding of, the Jury in which the illegality is alleged to occur. I find no such provision in the Criminal Procedure Code, and the words in Section 419 "after perusing the proceedings of the Sudder Court" do not seem to me to necessitate the perusal of the whole of the evidence, &c., when that is wholly immaterial on a point of law, but only those parts of the proceedings which are material to the question at issue. To send for the remainder of the proceedings would, therefore, be a mere empty form.

Seton-Karr, J.—After consulting with Mr. Justice Campbell, I think it advisable to send for the record in this case. No other order is necessary at present.

Seton-Karr, J.—The papers have now been forwarded, and after hearing the pleader for the appellants, and after calling on the Government pleader to reply, I am clearly of opinion with Mr. Justice Campbell that the legal effect of the Jury's finding on the whole case must be that the prisoners do go free.

To put the case as concisely as possible, the finding of the Jury frees the prisoners from the charge of culpable homicide, and, as a necessary consequence, of rioting attended with culpable homicide. It is true that the Jury found the prisoners guilty of rioting under Section 147. But a comparison of the offence of rioting and of unlawful assembly, as defined in Sections 146 and 141 of the Code, with the other facts found by the Jury, completely cuts away this further ground from the prosecution. For the Jury also find that the opposite party, and not the prisoners, were the aggressors; and that the prisoners were assaulted on their own lands. Clearly, then, their object could never have been one of those contemplated in the 3rd, 4th, and 5th Clauses of Section 151. They were not, the Jury practically find, either going to commit mischief or criminal trespass, or going to deprive any person of any property or right, or going to compel any one by criminal force to do what he ought not to do, or to omit to do what he ought. On the contrary, on the facts found as to the possession and ownership of the field, they were only exercising the right of private defence contemplated in Section 104, without the aggravation which would have deprived them of the benefit of that Section. The effect of the Jury's acquittal on the major charge of culpable homicide is to put the death of Shoobal out of the question as far as they are concerned; and if they are not legally guilty of his death, then they are not legally guilty of any other offence which can be coupled with rioting; for none other is even urged against them, and, not being rioters or members of an unlawful assembly, they can thus claim the benefit which was intended by Section 104 for persons who exercise the right of private defence within certain limit. Those limits they are not found to have exceeded.

I do not lose sight of the fact that, by law, an assembly which was, at first, lawful may become subsequently an unlawful assembly (Section 141, Explanation). But the prisoners have been found not to have committed the extra act which would have converted their assembling for such a legal purpose as the defence of their own property into an illegal mob: to wit, either the death of Shoobal, or any other extra and unlawful act; and, as to their numbers and any force used by them, such as mere repelling aggressions, the law, on the facts found, would protect them under Section 104.

The prisoners are released.

The 11th July 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Criminal Breach of Trust.

Queen *versus* Subdar Meeah, Constable.

Committed by the Assistant Commissioner, and tried by the Deputy Commissioner of Cachar.—Crime charged—Theft.

A constable, who dishonestly misappropriates to his own use the pay of his Thana Police entrusted to him, is guilty of criminal breach of trust.

Seton-Karr, J.—THIS case is not so clear as it might have been made in the Deputy Commissioner's decision, though it is quite clear on the evidence.

It appears to me that the facts of this case, as disclosed by the evidence, prove the guilt of the prisoner beyond doubt or question. The prisoner, lawfully entrusted with the pay of the Thana Police, disappeared, for six months, on his way to the thana; and then, on arrest, told an improbable tale of the upsetting of a boat, whereby he only saved twenty rupees out of hundred and one, which twenty rupees he afterwards spent on himself.

The finding on such facts should, it appears to me, have been for criminal breach of trust under Sections 405 and 409, and to this the sentence and finding should be altered—the punishment remaining the same.

Kemp, J.—I quite concur. There was no dishonest taking. The possession of the money by the prisoner was a legal possession. The money was entrusted to the prisoner, and he held it subject to the duty of applying it for the purposes for which it was entrusted to him, *viz.*, the payment of the salaries of the Officers of a Police Out-Station, of which he, the prisoner, was constable. He dishonestly misappropriated the money to his own use, and is, therefore, guilty of criminal breach of trust. The finding and conviction must be altered. The sentence may stand.

The 11th July 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Transportation—Substitution of, for Imprisonment.

Queen *versus* Tonooram Malee and others.

Committed by the Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of theft in a building.

Transportation can only be substituted for imprisonment when the offender is sentenced to at least 7 years' imprisonment in one case.

Kemp, J.—THESE prisoners have been convicted of theft in a building, Section 380.

There were three distinct cases of theft. The prisoners were discovered by the police dividing the spoil. Much suspicious property, in addition to the properties which have been well identified by the three parties who were robbed, was found in the possession of some of the prisoners, and for which they could not honestly account. Of their guilt I entertain no doubt.

The only point requiring remark and revision is the illegality of the sentence of transportation. Under the terms of Section 59 of the Indian Penal Code, imprisonment can be converted into transportation only in a case in which the offender has been sentenced to at least seven years' imprisonment. In the present instance, though some of the prisoners are convicted in all the three cases, and the aggregate sentence in the three cases may be more than seven years, still, as in no one case has a sentence of seven years been passed, the provisions of Section 59 will not apply.

The sentences being illegal, I would annul them, and pass the proper sentence, which is, that the prisoners be rigorously imprisoned for the period fixed by the Sessions Judge instead of being transported.

The papers will be sent to my learned colleague.

Seton-Karr, J.—I concur. Two Judges in the English Department have ruled the same already.

The 12th July 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Defamation.

Queen *versus* Pursoram Doss.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Tirhoot, on a charge of defamation.

A person, using defamatory expressions for the protection of his son's interests, is not privileged, unless the imputation is made in good faith, *i. e.*, with due care and attention.

Kemp, J.—THIS is an application to review our judgment, dated 22nd February 1865.*

Mr. Doyne, the learned Counsel for the applicant, contends that, under the English Law, a defendant in a criminal case is not tongue-tied, and that he may make use of any remarks, however defamatory *per se*, with perfect immunity and protection from indictment or action. This may or may not be so; but the present case is governed by the provisions of the Indian Penal Code.

The learned Counsel urges that his client is privileged under Exception 9 of Section 499 of the said Code; and, further, that the circumstances, under which the words attributed to his client were used, rebut the inference of malice, and show that they were made in "good faith," and for the protection of the interests of the party making them.

After due consideration, I adhere to our former judgment. Sitting as a Court of Revision, we must take the words used by the prisoner as found by the Magistrate and Judge. The words spoken by the prisoner were unquestionably defamatory; the imputation they conveyed was intended to harm, and was likely to harm, the reputation of Mr. McIver, the prosecutor, in respect of his calling as an Indigo Planter. Moreover, the words conveying the imputation were not used with "due care and attention," and consequently were not used in "good faith." It has been said in the course of the argument that, because there was some ground for the statement that some previous charge of burning the refuse of the Indigo crop in the time of a former manager, and which charge fell to the ground as unsubstantiated, had been made, the prisoner had some reasonable ground for using the words that he did, and may, therefore, have believed them to be true.

I am of opinion that this subterfuge will not avail the prisoner. Mr. McIver, the prosecutor in the present case, is well-known to the prisoner: the former was not the manager of the factory when the charge respecting the destruction of the refuse of the Indigo by fire was made, and this fact must surely have been well-known to the prisoner, who resides in the same district, and is a man of some note.

The words used by the prisoner were not necessary for the protection of his interest. The charge against the prisoner was 'riot.' The *factum* of the riot was established; the prisoner appears to have owed his acquittal to difficulty of identification. Now, any words that he might have used, having a direct reference to, or bearing upon, the charge of "riot," might possibly have been privileged; but the imputation made by him had no connection whatever with the offence with which he was charged; it went far beyond what the occasion required, and, further, it was not made in good faith.

I would reject the application; the conviction and sentence must stand.

Glover, J.—That the words used by the petitioner Pursoram Doss were in themselves defamatory, there can be no manner of doubt, whether we take the evidence of the prosecution-witnesses, or the petitioner's own statement as to the precise form of words employed. For the purposes of this review, we are, I imagine, bound to take the words as found by the Magistrate and Sessions Judge; but, in either case, the effect will be the same, and the only point for consideration will be, whether, under the circumstances, the words were privileged—whether, in short, the petitioner can claim the benefit of Exception 9, Section 499 of the Penal Code.

English Law gives great license to a defendant in the position of Pursoram Doss, and, I suppose, it may at once be conceded that by English Law the petitioner would be privileged.

Exception 9 above quoted recites: "It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interests of the party making it."

Now, there can be no doubt that the Mohunt, in accusing Mr. McIver of bringing false charges against innocent people, did so in the hope of damaging that person's credit

* See Weekly Reporter, Vol. II, p. 36.

quoad the charge of riot then being investigated, and, therefore, he acted for the protection of his own interests. The question that remains is, did he so charge Mr. McIver in "good faith."

"Good faith" is defined in Section 52 of the Penal Code as referring to things done or believed with "due care and attention."

Had, then, Pursoram Doss any reasonable ground for believing his charge against Mr. McIver to be true?

No doubt, there had been a charge of burning Indigo refuse, brought by a Manager of the Factory from which Mr. McIver had come, *viz.*, Ilmasnuggur, and that charge had been dismissed; but it is proved, by proceedings filed with the record, that the occurrence took place in the time of a former Manager, and that Mr. McIver had nothing to do with it, and Pursoram Doss, a man of some importance in the neighbourhood, and a landholder, could hardly have been ignorant of the real facts; for in his accusation of Mr. McIver, as admitted by himself, he mentioned, not only the name of the factory from which that person had come, but the names of the ryots said to have been falsely charged by him. In any case, however, it was for him to show that, in making his accusation against Mr. McIver, he acted with due "care and attention," that is to say, had made some enquiry into the circumstances.

That he might have heard the story, coupled with Mr. McIver's name, is possible, though, for the reasons above given, not probable, and also that in a moment of anger at being accused by that gentleman of participation in a riot, and without thinking of, or caring for, the consequences, he proclaimed his belief that Mr. McIver was in the habit of bringing false charges. But there is nothing about "provocation" in the Section of the Penal Code that refers to this case, nor is it anywhere laid down that even a natural sense of indignation at unjust treatment is sufficient to privilege a person using defamatory words, unless the imputation is made with "due care and attention" to serve his own interests. In the present case it cannot, I think, be contended that it was made with any "care or attention" at all; the words were used, probably, as the petitioner's Counsel suggests, in a moment of anger at finding himself the object of what he considered an "unjust accusation."

He must have known the story of the Indigo refuse burning, either of his own knowledge, or from hearsay: if the latter, he was not justified under the Penal Code in proclaiming his own views of it, or in accepting it as a fact without enquiry; if the former, he must have known that it was not Mr. McIver who brought the charge, but a former manager of the factory.

Taking all the circumstances, therefore, into consideration, I think that the words were not used with due "care and attention," and were, therefore, not privileged. As, however, this is probably the first case of the kind tried under the Penal Code, and as there would appear to be considerable misapprehension regarding the true scope and meaning of Exception 9, Section 499, Penal Code, I have no objection, if my learned colleague concurs, to diminish the punishment inflicted, and, in lieu of that awarded by the Magistrate, to impose a fine of 200 rupees. The prisoner has already undergone nearly a month's imprisonment, and this, with the fine, will be sufficient as an example.

We have the power of mitigating the sentence under Section 45 of the Code of Criminal Procedure.

Kemp, J.—I cannot concur in mitigating the punishment, particularly at this stage of the case. We are reviewing our former judgment on a dry point of law. The sentence is perfectly legal.

The 13th July 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Hindoo Ladies—Attendance of, as Witnesses.

Appeal from an order of the Sessions Judge of Backergunge, dated 15th June 1865, confirming that of the Magistrate, dated the 8th June 1865.

Queen *versus* Ram Doyal Dass.

The attendance of Hindoo ladies of respectability and secluded habits as witnesses should not be required where no case is actually before the Court.

Kemp, J.—I HAVE very carefully read and considered the papers annexed to this petition. As a general rule, I should hesitate to interfere with the order of a Lower Court, in the matter of summoning a witness, as the question of the propriety of so doing or not so doing is one which may (in any but unexceptional cases) be safely entrusted to the discretion of the local authorities.

In the present case, the lady makes no charge; the petition, which was presented by Ram Doyal Kur, is withdrawn; and it is broadly intimated that it was never presented with his sanction.

The ends of justice do not require the attendance of the lady, who is a female of respectability and secluded habits. To insist upon her attendance in a case in which no distinct charge is made would simply be to disgrace the family. I think this is clearly a case in which the Sessions Judge might have interposed his authority, and prevented an act of great injustice.

The order of the Magistrate, insisting upon the attendance of the lady, is reversed.

Copy of this order to be sent to the Sessions Judge for communication to the Magistrate.

Seton-Karr, J.—I concur. There does not appear to be any case before the Court. If the Magistrate has still any doubts as to the free action of this Hindoo lady, he can surely take means to satisfy himself whether she is or is not a free agent without dragging her into Court, thereby vexing and annoying the family.

The 17th July 1865.

Present:

The Hon'ble G. Loch, F. B. Kemp, and W. S. Seton-Karr, *Judges.*

Culpable Homicide not amounting to Murder—Rioting—Grievous Hurt—Right of private defence.

Queen *versus* Tanoo Shikdar, Azgur Shikdar, Munnoo Shikdar, Abbas Fuqueer Soleem, Mosad Mollah Jahir, Bochem Mollah, and Abbas Akoond.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of murder, &c.

Dispute between two parties (the Mollahs and Shikdars), in which the Shikdars attacked and killed one of the Mollahs when exercising the right of re-taking their own property; three of the Shikdars being also wounded. The Shikdars were convicted of culpable homicide not amounting to murder and rioting. As to the Mollahs, *Loch, J.*, was of opinion that they were guilty of voluntarily causing grievous hurt; while the majority of the Court held that they were entitled to the protection conferred by Section 101, Penal Code, on those who, while exercising the right of private defence, caused their assailants any harm other than death.

Loch, J.—This is a case which, before the Penal Code was enacted, would have been designated "an affray with homicide." The two parties, noted in the margin, armed with various weapons, met and had a fight, and one of the first party was killed by a stab from a *soolfee*, and three of the other party were wounded.

1st Trial.
1st Party.
Tanoo Shikdar.
Azgur Shikdar.
Munnoo Shikdar.
Abbas Faqueer Soleem.
2nd Party.
Mosad Mollah Jahir.
Bochem Mollah.
Abbas Akoond.

The Judge, trying the first case, corrected the charges on which the prisoners were committed, and held that the proper charges against them were Sections 302, murder; 304, culpable homicide not amounting to murder; 326, voluntarily causing grievous hurt by dangerous weapons; and 148, rioting, armed with deadly weapons.

The Sessions Judge, concurring with the Assessors, found all the prisoners guilty under Section 304, and sentenced them each to seven years' transportation.

Also, in concurrence with the Assessors, he found them guilty under Section 326, and sentenced all the prisoners to seven years' transportation, such sentence to commence, and to be concurrent with the sentence under Section 304.

He, further, in concurrence with the Assessors, found all the prisoners guilty under Section 148, and sentenced them to three years' rigorous imprisonment, such sentence to take effect from the commencement of, and to be concurrent with, the sentence under Section 304.

Two appeals have been preferred from this sentence passed upon them by the Sessions Judges: one by the Shikdars, or *first* party; the other by the Mollahs, or *second* party. The legal objections taken by both are similar. The objections as to the facts found differ.

On the part of the Shikdars it is urged that their allegation has not been properly investigated, nor their witnesses examined at the trial; that the witnesses for the prosecution are strangers, or connected with Mollahs, and, therefore, their evidence is not trustworthy. They allege that the breach of the peace originated in a cow of Azgur's trespassing on the field of Monsoor Mollah, the deceased, and that in revenge he and the others of the second party, armed, attacked their

houses and plundered their property, and that they acted merely in self-defence; that, during the scuffle, Monsoor received a stab which caused his death, and some of their party were wounded; that, as they acted in self-defence (a fact which could have been proved had the evidence of their witnesses been taken), they cannot be considered to have committed any offence punishable by law; that, even if the evidence for the prosecution be considered creditable, yet even then they cannot be held guilty of the offences of which they have been convicted. Exception is also taken to some of the witnesses as being hostile to defendants.

The Judge finds that there was a sudden fight, and, therefore, the case comes under Exception 4, Section 300, which removes the offence from the class of wilful murder, and brings it under the head of culpable homicide not amounting to murder; and he considers that, under Section 146, Penal Code, all the parties being members of an unlawful assembly, are guilty of the offence committed in prosecution of a common object.

It is contended for the appellants that the prisoners were not members of an unlawful assembly; for, even if their number exceeded five, they were not in pursuit of any common object; that, even if they had a common object, it must be shown that that object was one or other of the five enumerated in Section 141 to make it an unlawful assembly; and, though it be fully admitted that an assembly, not unlawful when assembled, may subsequently become so, yet the Sessions Judge does not find such to be the case in the present instance.

It is further urged that, if the prisoners do not come within the meaning of Section 149, they cannot be convicted of culpable homicide, for it is evident that all did not join in killing Monsoor. The evidence points to one individual. If he be guilty of that offence, they cannot be convicted of the same.

With regard to the conviction under Section 326, it is urged that the Judge has not showed what was the cause of the breach of the peace, nor has he determined by proper evidence the place in which it happened. If, as urged by the appellants, their houses were attacked, they were justified in using weapons in self-defence.

Against the conviction under Section 148, it is urged that, until it be shown that they were members of an unlawful assembly, they cannot be convicted in this Court; and, if the other charges fail, this must also.

On the part of the Mollahs it is urged that they were in the exercise of a legal right when attacked by the body of Shikdars, armed with spears and harpoons; that Moonsoor was endeavoring to secure a cow belonging to Azgur Shikdar, which had trespassed in his rice-field; that Azgur came to rescue it from his hands, and called the other Shikdars to his assistance; that they came armed to the spot, crossing the khal which was the boundary between the two villages; that Monsoor called to his brothers for help, and they ran to his assistance armed with sticks; that a fight occurred, and that Monsoor was stabbed; that the Shikdars were the aggressors, and came armed to prevent the Mollahs doing what they were legally entitled to do. The pleader for the Mollahs also adopts the legal objection raised by the pleader for the other party.

It is necessary first of all to dispose of the objection raised by the pleader for the Shikdars that, out of seventeen witnesses cited by him, only six were examined. I find the names of the seventeen witnesses for the defence of the Shikdars entered in the calendar, of whom seven were examined, and the others were absent at the trial. Their absence at the trial is a sufficient reason why they were not examined, nor do I find that any application was made to the Judge to enforce the attendance of these witnesses, so that this objection is untenable. Of the evidence given by the witnesses on the part of the Shikdars who were examined, it may be safely said that it is unworthy of credit, and quite insufficient, in my opinion, to support the defence set up by the Shikdar prisoners. The Mollah prisoners all plead *alibi*, and of course have found no difficulty in producing witnesses to depose to their respective statements.

I have read the evidence for the prosecution. and see no grounds for discrediting it. Some of the witnesses have perhaps not disclosed all they know as to the origin of the quarrel. Most of them attribute it to the cattle of the Shikdars trespassing in the rice-fields of the Mollahs, but they do not say how they ascertain this to be the case. The only witness who gives clear and credible evidence on this point is Panjoo, Shikdar No. 5. He says he saw Monsoor Mollah and Azgur Shikdar dragging at a cow; Azgur called out, and Tanoo No. 180, Munnoo No. 182, Soleem No. 184, and Akbur Fuqueer No. 183, ran to his assistance armed with spears, &c.; on the side of Monsoor were Zalim No. 186, Bachun No. 187, Imrad

No. 185, Abbas Akhoond No. 188, armed with *lattees*, and both parties fought; Monsoor was wounded by Tanoo; and he adds the Shikdars' cow had eaten Monsoor's rice, hence the fight. And, from the evidence of other prisoners, it is proved that the fight took place on Monsoor's and Bachun's ground, so that it is clear that the Shikdars crossed the khal which separated their village from that on the Mollahs when they went to the assistance of Azgur. The story told by the witness Panjoo Shikdar appears to me to be the truth, and to give the real facts of the case. Other witnesses speak to the fact that Monsoor fell by the hand of Tanoo; and, as the numbers on either side were few, it is by no means impossible that the witnesses were able to see what they have deposed to. It appears to me quite clear, from the evidence of the prosecution, that Monsoor, in attempting to secure the cow which was destroying or trespassing on his crop, was only exercising a legal right; that Azgur, in attempting to rescue the animal from his custody, and the others who came to his assistance, were clearly guilty of an illegal act tending to cause, and which did cause, a serious breach of the peace in which Monsoor received a wound from the hand of Tanoo, which caused his death. But, though the Shikdars committed an illegal act in attempting to rescue the cow from Monsoor's custody, that was no sufficient reason why the Mollahs should go to their assistance armed with clubs, and prepared and intending to commit a breach of the peace. Their intention must be gathered from their acts. They cannot plead Clause 1, Section 97 of the Indian Penal Code, as justifying their conduct, for, though that clause declares the right of private defence to extend to the defence of one's own body, and the body of any other person against any offence affecting the human body, it does not authorize men to rush armed with sticks, and with the intention of committing a breach of the peace, to the assistance of a party who is being resisted in doing an act which he is authorized to do by law. Their presence so armed was calculated rather to cause a breach of the peace than to preserve it; nor does it appear that, when they ran to the spot, any attack had been made on the person of Monsoor. Looking at all the circumstances of the case, it appears to me to be proved that the Shikdars went armed with spears and weapons to the assistance of Azgur Shikdar, who was endeavoring to take a cow which was trespassing from the lawful custody of Monsoor, deceased; that the Mollahs, summoned by Monsoor, ran to his assistance armed with sticks and clubs; that an affray took place in which Monsoor was stabbed by Tanoo Shikdar and Azgur Shikdar, and Soleem Shikdar received grievous hurt.

The Shikdars are guilty, therefore, under Section 141, Clause 5, *viz.*, that they, being members of an unlawful assembly, compelled Monsoor, by means of criminal force, to omit to do what he was legally entitled to do; Monsoor, in securing the trespassing cow, was doing an act which he was legally entitled to do. The Shikdars, in numbers more than five, assembled with the object of preventing his so doing. Tanoo, one of their number, stabbed Monsoor with a spear, from the effects of which wound Monsoor died. Tanoo is guilty, therefore, of culpable homicide not amounting to murder, under Section 304, Indian Penal Code, and the others of his party are guilty of aiding and abetting him in that act, and are also guilty under Section 149 of the Code, as the homicide was not committed in prosecution of the common object; they are guilty also of rioting under Section 148.

On the other side, Mosad, No. 185, is guilty of the offence described in Section 326 of the Indian Penal Code, *viz.*, the voluntarily causing grievous hurt by means of an instrument, which, used as a weapon of offence, is likely to cause death, and the other Mollahs of aiding and abetting him. They have also committed an offence under Section 141, Clause 4, inasmuch as, when members of an unlawful assembly, they, by criminal force, endeavored to obtain possession of property, and to enforce a right, and, therefore, the provisions of Section 149 are applicable to the whole of them for any act done by one of their number. The records of two supplementary trials have also been sent up to the Court: one in which Monabodee has been convicted by the Sessions Judge of wilful murder, and sentenced to transportation for life.

Prisoner Monabodee.

The *second*, in which Zahir Mollah and Zaheer Mollah have been convicted of culpable homicide not amounting to murder under Section 304, and of riot under Section 148, and sentenced to seven years' transportation.

Prisoner Zahir Mollah.
Prisoner Zaheer Mollah.

The finding in these two trials is inconsistent. The judgment in the case of Monabodee appears to have been passed in conse-

quence of some remarks made by the High Court in the Criminal Statements of Zillah Backergunge for the month of January 1863, in which a report of the first trial was entered, and from the terms of that report it appeared that the conviction should have been for murder, and not culpable homicide not amounting to murder. On first reading the judgment, I was of the same opinion, and it was not till I looked into the evidence that I considered the Judge to be correct in holding that the prisoners were guilty of the lower crime of culpable homicide. Monabodee is one of the party of the Shikdars, and cannot be convicted of a higher offence than that of which the others were found guilty. I convict him of aiding and abetting in the culpable homicide of Monsoor under Section 304, Penal Code, and under Section 149, he being a member of an unlawful assembly, and committing the offence described in Section 141, Clause 5. I also find him guilty under Section 148.

The Judge has acquitted Zahir Mollah and Zaheer Mollah of the charge under Section 326, *viz.*, that of causing grievous hurt by the use of dangerous weapons, and convicts them under Section 304 of culpable homicide not amounting to murder, an offence of which they are not guilty; and of rioting under Section 148 of the Penal Code. Now, it is clear that these persons were members of an unlawful assembly, having a common object, the enforcement of a right by criminal violence. In furtherance of this object, they used criminal force, and wounded some of the other party, but did not kill any one; so that they cannot be said, under Section 149, Penal Code, to have been guilty of culpable homicide not amounting to murder, but are really guilty of the offence of causing grievous hurt, under Section 326, by means of instruments which, used as weapons of offence, were likely to cause death. They are also guilty of rioting under Section 148.

Looking, therefore, to the evidence in the case, I convict the prisoner Tanoo Shikdar, under Section 304, Penal Code, of culpable homicide not amounting to murder, and confirm the sentence of seven years' transportation. I convict the prisoners Azgur, Munnoo Abbass, Fukeer Soleem, and Monabodee, of aiding and abetting culpable homicide not amounting to murder, and sentence them to seven years' transportation. I convict all the above prisoners under Section 141, Clause 5, as having, whilst members of an unlawful assembly, used criminal force to compel Monsoor not to do what he was legally entitled to do, and, while so acting, of having committed culpable homicide not amounting to murder, of which all are guilty under Section 149, it having been committed in furtherance of their common illegal object I also convict them all of rioting under Section 148; but, on those two last charges of which the prisoners are proved guilty, I add no further sentence.

I convict the prisoners Mosad Mollah, Jalin, Bochin Mollah, Abbass Akhoond, Zahir Mollah, and Zaheer Mollah, under Section 141, Clause 4, of having, while members of an unlawful assembly, attempted by criminal force to take possession of property, and to enforce a right, and, while so doing, to have been guilty, under Section 326, of having caused grievous hurt, of which offence all the prisoners must, under Section 149, be held equally guilty.

I convict them also of rioting under Section 148; but, as they were not the aggressors, I would reduce their sentence to five years' rigorous imprisonment, and, therefore, send the case for the opinion of another Judge.

As the Judge has sentenced Monabodee to transportation for life, his case must also go before a second Judge, in order that his sentence may be reduced to seven years' rigorous imprisonment commutable to transportation.

I draw the attention of the Sessions Judge to the Circular Order of 20th August 1864, No. 16.

Kemp, J.—This case has been referred to me by my learned colleague. It is a Backergunge case. It appears that there are two parties concerned, whom, for facility of reference, I shall designate the "Shikdar" party and the "Mollah" party. These parties live in separate but neighbouring villages, a stream of water dividing the two villages.

It is in evidence (*see* more particularly the evidence of the witness Poojoo, whose testimony my learned colleague considers to be trustworthy and independent) that a cow or cows belonging to the prisoner Azgur Shikdar, the brother of Tanoo, the head of the Shikdar party, trespassed upon the field, and destroyed the crops of the deceased Monsoor Mollah. Monsoor Mollah seized one of the cows, apparently intending to take it to the pound. Azgur resisted *this legal act*, and a struggle took place between Azgur and Monsoor, the former trying to rescue the cow, the latter to prevent him. Azgur shouted out to his party, who crossed

the *khal* armed with spears and other sharp pointed instruments. Monsoor, the deceased, then invoked the aid of his brother and neighbours. They turned out armed with sticks; a fight took place, and, in the *melee*, Monsoor was speared through the heart by Tanoo Shikdar, and died from the effects of the injury received about 7 or 8 hours after the occurrence of the crime. On the side of the Shikdars, the prisoners Tanoo, Azgur, and Soleem were wounded. Tanoo's wounds are described by the Civil Surgeon as two in number, slight wounds, and probably inflicted with a stick. Azgur's wound, one in number, is described as severe, inflicted with a stick. The wounds of Soleem are described as three penetrating wounds, small but deep, inflicted most probably with some sharp weapon with two prongs.

The Sessions Judge, Mr. W. T. Tucker, finds that the fight was a sudden one, and not premeditated; that all the prisoners took a part more or less active in the offence which, in his opinion, does not amount to murder, but to culpable homicide not amounting to murder. He, therefore, convicts all the prisoners: *first*, of culpable homicide not amounting to murder; *second*, causing grievous hurt; *third*, rioting, armed with deadly weapons; and sentences all the prisoners to seven years in transportation for the first named offence, seven years in transportation for the second, and three years' rigorous imprisonment for the third.

Both parties appeal. The Shikdar party, while they admit that the cow of Azgur, one of their party, trespassed on the crop of the deceased, aver that the deceased and his partizans attacked their houses, and plundered them, and that they acted in defence of their property, and are justified. The Mollah party urge that they were exercising a legal right when they were attacked by the Shikdar party armed with spears and other dangerous weapons; that, on being called upon by the deceased, their relation, to assist him in his strait, they did so, and that in so doing they were justified under the law.

My learned colleague, Mr. Justice Loch, admits that the scene of the fight was the field of the deceased, and that the Shikdars crossed the *khal*, and so far were the aggressors. But he cannot absolve the Mollah party from responsibility, inasmuch as, in his opinion, there was no good and sufficient reason why the Mollah party should have gone to the assistance of the deceased. That, by doing so, and judging them by their own acts, it must be inferred that they went prepared and intending to commit a breach of the peace; that they cannot avail themselves of the plea of the right of private defence of their own bodies or property, or the body or property of another against any offence affecting the human body or property.

The learned Judge convicts Tanoo Shikdar of culpable homicide not amounting to murder, and sentences him to seven years in transportation.

The other prisoners connected with the Shikdar party he convicted of abetting the offence of culpable homicide not amounting to murder, and sentences them to seven years in transportation. As to the other party, the Mollah party, the learned Judge convicts Moosad Mollah of voluntarily causing grievous hurt (Section 326 of the Indian Penal Code), and sentences him, in mitigation of the sentence passed by the Sessions Judge, to five years' rigorous imprisonment. The remaining prisoners on the side of the Mollahs he convicts of aiding and abetting the above offence, as also committing an offence as described in Explanation fourth (Section 141 of the Indian Penal Code)—sentence five years' rigorous imprisonment.

I regret that I cannot take the same view of the case as that taken by my learned colleague. It appears to me that the Shikdars were clearly the aggressors. Monsoor Mollah was acting perfectly legally in attempting to carry the trespassing cow to the pound, and Azgur was clearly acting illegally in attempting to rescue it by force. The Shikdars thrust themselves into the quarrel. They crossed a *khal*, armed with very dangerous weapons, with the determination to assist and abet their partizan Azgur in his illegal act. Monsoor, seeing the imminent danger he was in, and exercising the right of defending his own body and the property which had come into his custody in a perfectly legal manner, invoked the aid of his relations and neighbours; and here, I may observe, that the prisoners Mosad and Bochun are brothers, as are also Johur and Abbas: in fact, they are the relations of the deceased. They saw him in imminent danger, and they went to his aid, and struck a few blows in his defence. In doing this, under the circumstances above detailed, I hold them to have exercised a legal right of defending their relation, the deceased Monsoor Mollah, against an offence imminently theatening his body and the property which was legally in his custody. There was no time for the deceased to have recourse to the public authorities. His person and his legal rights

were threatened, and the danger was imminent. He called upon those who he thought would protect him, and they, instead of standing aloof, responded to the call. The Mollah party do not appear to have inflicted more harm than was necessary in defending themselves. They were armed with sticks only, and the injuries inflicted upon the opposite party were not very severe. Whereas the opposite party deliberately crossed the boundary stream, were armed with spears and other dangerous weapons, and one of them pierced the deceased through the heart. and killed him.

I would acquit the Mollah party, consisting of the prisoners named in the margin.*

* 1. Mosad Mollah.
2. Jalin.
3. Lochun Mollah.
4. Abbas.
5. Zaheer Mollah.
6. Zahir Mollah.

If the conviction is held to be good by another Judge, I certainly think the punishment proposed by my learned colleague, taking into consideration the sentence he proposes for the party whom he admits to be the aggressors, is too severe; and in this view I would ask him to re-consider the sentence which he proposes to pass on the Mollah party. I concur in reducing the sentence of Monabodee on the side of the Shikdars, as proposed by my learned colleague. Monabodee is guilty of the same offence as the other members of the Shikdar party; and, as he did not take a more active part in that offence than the other prisoners, I see no reason to make any distinction in the punishment awarded.

The papers must be laid before another Judge.

Seton-Karr, J.—The trial, as regards the Shikdars, has been finally decided; but this case has been referred to me as regards the party which, for the sake of perspicuity, may be termed the Mollah party. Both my learned colleagues agree as to the facts of this case, as to the cause and scene of the dispute, and as to the manner in which the various injuries sustained by both parties were inflicted.

As regards the legal points raised in favor of the Mollahs, I concur in the conclusions arrived at by my learned colleague, Mr. Justice Kemp. The Shikdars were all along the aggressors. The cow of the Shikdar trespassed on the field of Monsoor Mollah. He, Monsoor, captured the animal, as he had a right to do, and was about to take him to the pound. The Shikdars crossed the *khal*, armed with lethal weapons, attacked Monsoor, and one of them killed him by the thrust of a spear. Before this last event happened, the relations of the deceased Monsoor came up, and endeavored to assist him in the retention of that which had lawfully come into his hands, and in defence of which he and those who came to his assistance were only exercising a legal right. They inflicted no hurt on the party of the Shikdars, which could not be justified under some portion or other of the Sections of the Penal Code, 96 to 101 inclusive. They certainly wounded three of the attacking party; but that party had attacked their relation when exercising a right of legal capture on their own property, and finally caused his death. There was no time to apply to the proper authorities, and, if in repelling the murderous and illegal attack, and resisting the re-capture of the cow, the Mollahs did use force, and did ply their sticks, they may be fairly said to have inflicted "no more harm than was necessary for the purpose of defence" (Sec. 99, Cl. 4), and they are certainly entitled to the protection which Section 131 confers on those who, while exercising the right of private defence, cause their assailants "any harm other than death."

The whole of the Mollah party must be released.

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The 18th July 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Disputed possession of land—Jurisdiction.

Queen *versus* Juggobundoo Sircar and John Stevenson.

A Magistrate may direct a Deputy Magistrate, vested with the full powers of a Magistrate, to pass proper orders in a case of disputed possession of land decided by him under Section 318, Code of Criminal Procedure, but he cannot withdraw the case from the file of the Deputy Magistrate, and, instituting a fresh case, dispose of it himself.

We concur with the Sessions Judge that the Magistrate was wrong in supposing that he was legally justified in instituting a fresh case to decide the question of possession under Section 318 of the Code of Criminal Procedure, which had already been disposed of by an officer of equal powers with himself. It appears that the Deputy Magistrate, who is vested with the full powers of a Magistrate, under Section 318 of the Code of Criminal Procedure, gave possession to the first party. In executing the order it was found difficult to lay down the proper boundary line. An attempt was made by the Deputy Magistrate, but his proceedings were objected to by both parties. The Deputy Magistrate, instead of disposing of the question, ordered the papers to be filed in the Sherishta; by this step he left both parties dissatisfied, and the quarrel just as it stood before his interference.

The Magistrate, instead of directing the Deputy Magistrate to pass proper orders in the case, and without, as far as we can see, withdrawing the case from the file of the Deputy Magistrate, under Section 36 of the Code of Criminal Procedure, proceeded to pass orders. In this, we think, he acted beyond his competency. The papers will be returned to the Sessions Judge, who will direct the Deputy Magistrate to take up the case, and decide the boundary dispute between the parties, which he has not hitherto done.

The 24th July 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Arrest under Civil Process of Judgment-debtors cited as Witnesses—Contempt of Court—Protection.

Referred under Section 434, Act XXV. of 1861, and Circular Order, dated the 15th July 1863.

Thakoordoss Nundee *versus* Shunkur Roy and another.

The arrest under Civil Process of a Judgment-debtor going to a Court in obedience to a citation to give evidence, and made within the precincts of that Court, and with some show of violence and contempt of Court, does not entitle the officers making the arrest to protection under Section 78, Penal Code.

We have read the reference made by the Sessions Judge, and the explanation submitted by the Deputy Magistrate, Mr. W. H. Ryland.

We are of opinion that the Deputy Magistrate's proceedings are strictly legal. The peons were acting entirely beyond their jurisdiction, and are not entitled to claim protection under Section 78 of the Indian Penal Code.

The judgment-debtor, Thakoor Doss Nundee, had been cited as a witness before the Deputy Collector; he was on his way to the Court of that Officer when he was arrested by the two peadahs under a civil process. The peadahs made this arrest within the precincts of the Deputy Magistrate's Court, and with some show of violence and contempt of Court. The peadahs were informed by the judgment-debtor, as well as by the officers of the Deputy Collector's Court, that the judgment-debtor was entitled to protection from arrest under civil process. The protection is "*eundo, morundo, et redundo,*" and a reasonable indulgence must be given in construing what is to be held as going, staying, and returning. In this case the witness was clearly going to the Court of the Deputy Collector in obedience to a citation to give evidence, and he was protected from all arrest, which, in this instance, appears to have been made in the sight of the Deputy Magistrate, and in contempt of that officer's authority. The papers are returned.

The 25th July 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Unlawful Assembly—House Trespass—Mischief.

Queen *versus* Suroop Napit and others.

Committed by the Magistrate of Furreedpore, and tried by the Sessions Judge of Dacca.

House trespass and mischief not being separate offences, but being included in the graver offence of being members of an unlawful assembly armed with deadly weapons, no separate convictions and sentences were deemed to be requisite.

Kemp, J.—SUROOP NAPIT was committed by the Magistrate of Furreedpore under three Sections of the Indian Penal Code, *viz.*, Sections 144, 448, and 427. The sentence passed was: two years for the first offence, one year for the second, and one year for the third : total four years.

The other prisoners were convicted under the same Sections, and were sentenced to one year for the first-named offence, six months for the second, and six months for the third. These sentences were upheld on appeal by the Sessions Judge. This Court, acting as a Court of revision, called for the record to satisfy itself of the legality of the sentence passed.

It is clear that the prisoners were guilty of being members of an illegal assemblage, armed with deadly weapons, and they have been properly committed and sentenced under Section 144. But the offences of house-trespass and mischief were not separate offences, but were the fruits and consequence of the illegal assemblage. Separate convictions and sentences were not called for, and the order of the Magistrate must, to this extent, be quashed. The sentences passed for the graver offence, in which the minor offences are included, will stand.

The papers must be laid before my learned colleague, Mr. Justice Seton-Karr.

Seton-Karr, J.—I concur. The respective sentences under Section 144 will alone stand good.

The 25th July 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Riot—Zemindar not liable for Sudden.

Queen *versus* Hurnath Roy.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of neglecting to use lawful means to prevent riot, under Section 155, Indian Penal Code.

A zemindar ought not to be made liable, under Section 155, Penal Code, for a sudden and unpremeditated riot which there was no reason to infer he could have anticipated, or thought likely to happen.

Seton-Karr, J.—IN this case the Sessions Judge has taken a substantially correct view of the dispute between the parties in the riot, attended with the death of Meeroolla, as far as the conduct of the rioters is concerned. His orders on the conduct of the persons actually engaged in the riot have been upheld in appeal.

But the point in this appeal is, whether the zemindar appellant, Hurnath Roy, can be held responsible, under Section 155 of the Penal Code (liability of a person for whose benefit a riot is committed), and liable to a fine of 3,000 rupees?

I lay no stress whatever on the distance at which the zemindar was residing from the scene of affray : his residence being in Cossipore, Calcutta, and the scene of the riot being in the District of Backergunge. A zemindar, by leaving his estates and residing at the Presidency, cannot avoid his duties and liabilities; and it is his business to appoint fit and proper persons to manage his local affairs, and to enable him to perform the duties imposed on him by the Legislature. Moreover, it is the zemindar's duty to be regularly acquainted with what goes on in his zemindary. Neither, again, am I prepared to accept a general argument, that the interest of the zemindar is to be measured or computed by the extent of the land in dispute, and that, if the plot be of small extent, he cannot be supposed to be benefited by its retention. It may happen, I hold, that the possession of one beegah, the extent in dispute in the present instance, may be of the utmost consequence to two rival zemin-

dars, and that either or both would strain every nerve in order to retain possession of the same.

On the other hand, I admit that the small extent of the land and the value of the crop, a crop of hemp, are facts which, *in this particular instance*, looking to all the circumstances, are *primâ facie* in the zemindar's favor.

But the whole case turns on this, *viz.*, fully admitting the duty which the law imposes on the zemindar, and the obligation of the Court to administer law with such good and wholesome severity as shall prevent the discredit to the administration arising out of violent and premeditated affrays, was the riot in this instance committed for the zemindar's benefit or on his behalf? Further, did he, having reason to believe that such a riot was likely to be committed, use all the means in his power to prevent it from taking place, and to suppress or disperse the same? (Section 155.)

Now, after hearing all the arguments of the learned Counsel for the appellant, and of the Government pleader in reply, and after referring to evidence, I find that the riot was most certainly *unpremeditated*. One of the witnesses for the prosecution distinctly says that the fight was "got up suddenly and without premeditation." Another man (Ahladee) also says, in reply to a particular question put to him, that he did not hear of any anticipation of a riot. The reference to arbitration, of which something has been said by the Judge, is also in favor of this view. Had there been some complaint in the Court, and had the matter in dispute been long left pending and undecided, while angry passions were excited, the zemindar, it might be said, ought to have surmised that an affray was possible or probable. But, if he knew nothing at all, or if he only knew that a dispute between his ryot and the ryot of another zemindar about a crop grown on one beegah of land had been referred to arbitration, there was really no reason why he should apprehend an affray, or why he should think of using means to suppress what was not apprehended. Arbitration is suggestive of an arrangement by peaceable means, and not by violence.

It is true that the Judge finds that some of the appellant's retainers took part in the riot, at which event it is stated that there were some 20 to 40 men on both sides; that none of these retainers appear to have been hired lattials, or brought from a distance. They were residents of the locality, and some of them, as employed in the lawful collection of the zemindar's rent, may, no doubt, be correctly termed retainers; but, if they went out suddenly of their own accord to help one of their own party to retain a crop to which they perhaps thought him entitled, and if they committed acts of violence by which one man was killed, it would not follow that the zemindar knew of or could, by any means, have prevented the affray.

On the whole, I am of opinion that the appellant cannot fairly be brought within the purview of Section 155. The dispute was about a small piece of land, and the cause of the dispute was the attempt to cut the crop. Not only is it probable that this attempt gave rise to a sudden dispute, but the witnesses for the prosecution pointedly speak of the occurrence as sudden and without premeditation. There is no reasonable or just ground, such as might be inferred without direct evidence, had the circumstances been different, that the zemindar ought to have known that an affray was impending, or was even probable; and, consequently, there is no good ground for punishing him, because, in the language of the latter part of the Section quoted, he did not use all lawful means in his power to prevent unlawful assembly or riot from taking place.

In this view I would remit the fine.

The papers must go to Mr. Justice Kemp.

Kemp, J.—After hearing the learned Counsel for the appellant, I entirely concur in the view taken by Mr. Justice Seton-Karr.

The fine must be remitted.

The 26th July 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Grievous Hurt on grave and sudden provocation.

Queen *versus* Chullundee Poramanick.

Committed by the Officiating Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of murder.

A person who, by a single blow with a deadly weapon, kills another—entering at dead of night into a dark room where he and his wife were sleeping separately, for the purpose of having criminal intercourse with her—held guilty of causing grievous hurt on a grave and sudden provocation.

Kemp, J.—THIS is a case in which I have come to the opinion expressed by me after considerable doubt. As the case must go

before my learned colleague, I would ask him to give it his careful consideration.

The notice of the offence was not given to the police until eight days after the occurrence of the crime—this is an important fact. The body of the deceased Bodhi Sircar was not subjected to a *post-mortem* examination by a medical officer. The body was exhumed on the eighth day after its burial; and, as might be expected, it then being the hot season (April), it was found in such an advanced stage of decomposition that no examination could take place.

There is nothing to implicate the prisoner Chullundee beyond the admissions made by him before the Magistrate. These admissions must be taken in their entirety, and are, to a certain extent, corroborated by the evidence of the witness Hossein, the son of the prisoner. The admissions amount to this, that the deceased was a man of influence in the village; entered the house of the prisoner at a late hour of the night for the purpose of having criminal intercourse with the wife of the prisoner; that the prisoner, to set his mark, for thus he describes it, upon the person of the intruder, threw a weapon, in this case a *dão*, at the deceased; that the deceased was killed on the spot; that the prisoner, assisted by his son, the witness Hossein, carried the body of the deceased out of their house, and threw it down near the house of the deceased, where it was found by the brother of the deceased, the witness Huddun, and others.

It appears that the principal men of the village took counsel together, and the result of their deliberations was, that it was agreed that the crime must be hushed up. The body of the deceased was buried, and his brother, the witness Huddun, was placed under strict surveillance for eight days, when he was allowed his liberty: notice was then given to the police, and enquiry was set on foot.

The prisoner Chullundee pleaded "not guilty" in the Sessions Court. In his petition of appeal to this Court he asserts that he is innocent; that the deceased died of cholera, and that his confession before the Magistrate was not a voluntary one, but was the result of the undue influence and bad treatment of the police.

The other prisoners, the heads of the village, who have been convicted, under Section 201 of the Indian Penal Code, of causing evidence to disappear, knowing or having reason to believe that an offence had been committed, have not appealed.

I have, therefore, to deal with the case of the prisoner Chullundee.

The Judge is unable to believe the admissions of the prisoner to their full extent.

He is of opinion that the prisoner must have struck the deceased when the lethal weapon was in hand, and he wholly discredits that part of the prisoner's admission which describes the manner in which the weapon was used, and the blow inflicted.

The Sessions Judge convicts the prisoner Chullundee of culpable homicide not amounting to murder, giving him the benefit of the grave and sudden provocation which he received at the hands of the deceased. The sentence passed on the prisoner is ten years' transportation.

There is no reliable evidence as to the cause of death; the body, as I have already observed, was not subjected to any *post-mortem* examination by a competent officer. The statement of the police officer and others who were present when the body was disinterred, as to the appearance and character of the wounds on the head of the deceased, must be received with the utmost caution, seeing that this evidence cannot but be based upon their observations of the appearance of the body after it had been admitted eight days in the earth, without any protection from decomposition and decay.

Taking, therefore, the admissions of the prisoner, which I assume to have been voluntarily made, corroborated as they are to some extent by the evidence of his son, the witness Hossein, I find that the deceased in the dead of the night, probably according to previous assignation, but of this there is no evidence, entered the house and room in which the prisoner and his wife were sleeping separately, the room being dark; that the deceased, in pursuance of his guilty purpose, placed his hands on the person of the prisoner's wife; that the prisoner, irritated at this outrage, threw the weapon at the deceased, who fell down, and then and there died. The prisoner, assisted by his son whom he called to his aid, then removed the body of the deceased from their house, and threw it down near the house of the deceased.

Taking into consideration the very grave and sudden provocation which the prisoner received, and the absence of the intention to kill, or knowledge that the act was likely to cause death—facts which I am bound to assume from the admissions of the prisoner, taken as a whole, and not construed as the Judge has done to suit his view of the offence and the prisoner's actions and intend

tions—I convict the prisoner Chullundee of "causing grievous hurt on grave and sudden provocation."—Section 335, Indian Penal Code. This is certainly not a case in which a severe punishment is necessary. I sentence the prisoner to one year's rigorous imprisonment, the term of his imprisonment to commence from the date of his original sentence.

The papers must be laid before Mr. Justice Seton-Karr.

The attention of the Sessions Judge is directed to Section 362 of the Code of Criminal Procedure: "The charge should be read and explained to each accused person," and the plea of each accused person should be separately recorded, and not in the lump, as has been done in the present instance.

Seton-Karr, J.—The sentence of 10 years' transportation, considering the grave provocation, is quite preposterous. We may not be quite certain as to the exact mode in which the blow was inflicted, but the deceased was evidently killed by one blow just as he was about to dishonor the prisoner. I concur in the sentence of the year's rigorous imprisonment proposed by Mr. Justice Kemp for the appellant, Chullundee Poramanick.

The 26th July 1865.

Present:

The Hon'ble C. B. Trevor and F. B. Kemp, *Judges.*

Insane Prisoners—Procedure.

Queen *versus* Kalai Sheikh.

Committed by the Deputy Magistrate, Basirhaut, and tried by the Sessions Judge, Jessore, on a charge of false evidence.

A prisoner who is insane and unaccountable for his actions, and therefore incapable of making his defence, instead of being tried, should be dealt with according to Sections 389 and 390, Criminal Procedure Code.

Trevor, J.—The Civil Surgeon deposes distinctly to the fact that the prisoner is of unsound mind, and not accountable for his actions. He is clearly, therefore, incapable of making his defence; and the Sessions Judge, instead of trying him in this mental state, should have proceeded under the provisions of Sections 389 and 390 of the Code of Criminal Procedure. The trial must be quashed, and he should be directed to act in accordance with the above cited provisions of the law.

Place this before another Judge.

Kemp, J.—I entirely concur.

The 31st July 1865.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Appeal—Bail—Suspension of Sentence.

Miscellaneous Case.

Queen *versus* Moorali Kinkur Mookerjee.

Appeal against the order of the Magistrate of Beerbhoom.

Although a Sessions Judge cannot release a prisoner on bail, pending an appeal, he may suspend the sentence pending the appeal.

The offence with which the prisoner has been convicted is not a bailable offence. I therefore think that the Sessions Judge was right in holding that he was not competent to release the prisoner on bail, pending the result of the appeal to his Court.

The Sessions Judge was, however, wrong in holding that he had no discretion to suspend the sentence. This power he clearly possesses under Section 421 of the Code of Criminal Procedure. The Sessions Judge will therefore be informed that, if he see reason to suspend the sentence pending the appeal, he is at liberty to do so, the prisoner remaining in the hajut instead of in rigorous imprisonment.

The 31st July 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

District Municipal Act—Nuisance—Liability to punishment for.

Queen *versus* Parbutty Churn Sircar.

Referred under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

A is punishable if his land is made filthy by nuisances committed by other persons. But, if A has sublet his lands to others, the actual occupiers of the land are liable.

The case is, in some respects, similar to that which formed the subject of the Sessions Judge's letter of the 12th of June, No. 170, the orders in which were communicated in the Resolution of the Court of the 21st of June.

We do not concur in the doctrine laid down by the Sessions Judge in the present reference, to the effect that "a person is not punishable if his land is made filthy by nuisances committed by other persons.

But in this case the real point has not been enquired into. The accused pleads, not that his land, while still in his own possession and under his control, has been made filthy by other persons, but that he has actually sublet his lands to ryots. This allegation should be enquired into, and, if it be proved, it would seem that the actual occupier of the land would be liable to fine under Section 67 of the Act quoted by the Judge.

We observe, too, that it would be sufficient, under Section 215 of the Code of Criminal Procedure, if the substance of the complaint was stated to the accused on his appearance. After this has been done, and the evidence has been heard, a brief but legal and formal finding should be recorded by the Magistrate.

We annul the sentence of the Joint Magistrate, and direct that the case be re-tried with reference to our remarks.

The 31st July 1865.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Jury (Province of).

Queen *versus* Rookni Kant Mozoomdar.

Committed by the Judge of the Small Cause Court, and tried by the Sessions Judge of Moorshedabad, on a charge of false evidence.

It is in the province of a Jury to weigh the evidence as to the truth or falsity of the evidence, and to judge of the intention.

This is a trial by Jury—no point of law arises. The prisoner has been convicted under Section 193 of the Penal Code, as well as under Section 199; under the former Section it is not necessary to prove that the evidence was false on a material point. There can be no question that the evidence was false, inasmuch as the assertion, that the employer of the prisoner was at Benares at the time the suit was filed on his verification, was false. The evidence was given in a judicial proceeding, and the intention was corrupt, to wit, to evade Sections 27 and 28, Act VIII. of 1859. Under Section 28, Act VIII. of 1859, the Court must be satisfied that, owing to absence, or some other good cause, the plaintiff is precluded from verifying the plaint. In this case the prisoner, styling himself general attorney of the plaintiff, a woman, avers that she is at Benares, and further verifies the truth of the contents of the plaint. When examined, he deposes that his employer was at Benares, and this has been found by the Jury to be an intentionally false statement.

It was in the province of the Jury to weigh the evidence as to the truth or falsity of the evidence, and to judge of the intention.

This Court, therefore, cannot interfere; the appeal is rejected.

The 7th August 1865.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Trial by Jury—Prisoner claiming right of reference to Sudder Court, entitled to opinion of Judge and to appeal.

Queen *versus* Chukkun *alias* Juggun Gowalah.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Patna, on a charge of murder.

A prisoner, by claiming the "right of reference to the Sudder Court," does not lose all right to the opinion of the Judge, and to appeal on the facts upon a trial by Jury.

Campbell, J.—THIS is a case of murder and theft, or "theft with murder," committed prior to 1st January 1862. I think that the Sessions Judge has somewhat mistaken the law now applicable to such cases. He is right in trying the case under the new Criminal Procedure. But I hardly think that the general remark, that "the prisoner has not claimed the right of reference to the Sudder Court," can be safely considered to deprive him of all right to the opinion of the Judge, and to appeal on the facts upon a trial by Jury. The facts must, I think, be considered open to revision, if the prisoner should appeal. We ought, therefore, to have on record the opinion of the Sessions Judge, whose opinion for or against the prisoner is in this case material. As important it is that the Sessions Judge seems to consider himself tied down by the provisions of Section 302 of the Penal Code. He appears in that view to have passed the sentence of transportation for life, and to refer the case with a view to its mitigation. I think it is not as the Sessions Judge supposes. The substantive Criminal Law, *i. e.*, the Penal Code, has no application to offences committed before it came into operation. The Sessions Judge has jurisdicton under the

new Procedure, and can, I think, pass any sentence (short of death) to which the prisoner is liable under the old law, subject to reference, if claimed, and to appeal under any circumstances. I have not seen the papers of the former trial, and it does not, on the face of these proceedings, appear why the sentence for such an offence should be reduced below transportation for life. At present I do not see the reason for such a course, supposing the prisoner to be guilty as found, for I have not gone into the evidence.

On the whole, I think, the best way will be to return the case to the Sessions Judge to record a judgment, and (if he convicts) to pass a sentence, leaving prisoner (if he does not claim a reference) a right to appeal on the law and facts, the verdict of the jury *non obstante.*

Let, however, another Judge see the papers before they are returned.

Kemp, J.—I concur. The course proposed by my learned colleague is much the same as that adopted by the learned Chief Justice and myself on a former occasion when the case was before us.

The 7th August 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Attempt to fabricate false evidence—Punishment for.

Queen *versus* Soondur Putnaick and Neemoo Pootoo.

Committed by the Assistant Magistrate of Nugwan, and tried by the Sessions Judge of Midnapore, on a charge of fabricating false evidence.

The term of imprisonment for attempting to fabricate false evidence for the purpose of being used in a stage of judicial proceeding cannot extend beyond one-half of 7 years.

Kemp, J.—THE prisoners have been convicted of the offence of attempting to fabricate false evidence for the purpose of being used in a stage of a judicial proceeding, punishable under Sections 193 and 511 of the Indian Penal Code. The sentence passed on each prisoner is five years' rigorous imprisonment, and to pay a fine of 20 rupees each, in default to suffer two months' further rigorous imprisonment.

It appears from the evidence that the prisoners gave information to the witness Ekana Allee, who is a Police Inspector, vested in that capacity with the power to hold preliminary enquiries into cases involving an infraction of the Salt Laws, that certain parties had concealed in their houses illicit salt which would be found if a search were made. The Inspector took the depositions of the two prisoners, and, upon the information thus obtained, proceeded to the village of Doobrabaree; the houses of the suspected parties were pointed out by the two prisoners, and were placed under surveillance. Suddenly the attention of the Police Inspector was directed to something suspicious in the appearance of the cloth which was tied round the waist of the prisoner Soondur. The Inspector directed the witness Pootoo, who was in company with him, to search the prisoner Soondur. On doing so two earthen vessels, with illicit salt in them, were found on his person. In the prisoner Neemoo's hands were found an earthen pot with illicit salt in it.

There can be little doubt that the prisoners, who are informers, intended to place the illicit salt in the houses or on the premises of the parties charged, to serve as evidence against them.

The Inspector was conducting an enquiry preliminary to a proceeding before a Court of Justice. The investigation was, therefore, a "stage of judicial proceeding." The prisoners are, in my opinion, guilty of "attempting" to fabricate false evidence for the purpose of being used in a stage of a judicial proceeding.

The maximum punishment for the offence of "fabricating false evidence in a stage of a judicial proceeding" is seven years' imprisonment of either description. An attempt to commit the above offence is punishable under the provisions of Section 511 of the Indian Penal Code; but the term of imprisonment cannot extend beyond one-half of the longest term provided for the substantive offence.

The sentence of five years, which is more than half of seven years, is, therefore, clearly illegal. I reduce it to three years in the case of both prisoners. With this exception the conviction will stand.

The papers must be submitted to Mr. Justice Seton-Karr.

Seton-Karr, J.—This seems to me the legal sentence under the two Sections quoted by the Sessions Judge.

The 7th August 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Fine not awardable as compensation in cases under Chapter XIV., Penal Code—Record of proceedings in cases under Chapter XV.

Queen *vs.* Nijanund.

Referred under Section 434, Act XXV. of 1861, and Circular Order No. 15, dated the 15th July 1863.

A fine cannot be awarded as compensation in a case falling under Chapter XIV., Code of Criminal Procedure.

In a case falling under Chapter XV., the statement of the complainant, the evidence of the witnesses, and the reply of the accused, should be recorded.

READ a letter from the Sessions Judge of Hooghly, submitting certain proceedings of the Deputy Magistrate, under the provisions of Section 434 of the Code of Criminal Procedure.

There can be no doubt that the order of the Deputy Magistrate, inflicting a fine and awarding the same as compensation in a case which falls under the provisions of Chapter XIV. of the Code, is illegal. This has been ruled by this Court in the case quoted by the Sessions Judge.

The Court further observe that, had the offence fallen under the provisions of Chapter XV., the proceedings of the Deputy Magistrate in not recording the statement of the complainant, the evidence of the witnesses, and the reply of the accused person, were wholly illegal.

It is unnecessary to notice the other minor irregularities noticed by the Judge.

The proceedings of the Deputy Magistrate are quashed. The fine must be refunded. The papers may be returned to the Sessions Judge.

The 8th August 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Dacoity (under the Penal Code)—Plunder.

Queen *versus* Khoyrat Ally Beg, Nowab Khan, Gorachand Barick, Saboo Khan, and Tarrachand Saut.

Committed by the Deputy Magistrate of Tumlook, and tried by the Sessions Judge of Midnapore, on a charge of dacoity, &c.

The definition of dacoity in the Penal Code is so wide as to extend to what would have been treated as cases of plunder under the old law.

Seton-Karr, J.—THE pleader for the appellants in this case endeavours to make out that the evidence does not bear out the charge of dacoity, of which they have been convicted by the Sessions Judge; and that the facts disclosed by the evidence, even if relied on, do not show more than house-trespass and perhaps attempt to plunder. In support of this, the pleader relies on the inability or unwillingness of the complainant to proceed with the 3rd count, of dishonest retention of part of the plundered property, and on the consequent acquittal of the prisoners on this charge altogether.

The charge of dacoity with murder also, it is to be observed, fell to the ground, because the blow inflicted on the man Gorachand by one of the party who is not present did not fall on a vital part; the injured man subsequently dying of fever, which supervened.

I have gone through the material part of the evidence, which has been very carefully taken, and which is very voluminous, and am satisfied that there is quite sufficient to show that the prisoners, who are clearly identified by credible witnesses, did attack the house of the complainant, and did plunder it of certain properties, breaking boxes, and carrying away rice and some other articles.

The evidence of Srinibas, the Sub-Inspector, who happened by chance, in the execution of other duty, to be passing that way, is good in corroboration of the main facts

deposed to by the eye-witnesses; the Sub-Inspector proves the fact, as he saw some traces of the outrage immediately after its occurrence. On the other hand, no great or permanent injury appears to have been done. Cattle belonging to the witnesses, Rabiram and Hari Puttur, if carried off, were almost immediately re-captured, and the complainant failed to identify any of the articles discovered in the houses of the prisoners, which were soon afterwards searched.

The Sessions Judge correctly remarks that the offence was not a dacoity, as such offences are commonly known in this country, but that it was a dacoity within the meaning of the law; and he ascribes the origin of it partly to a private quarrel and partly to a "*dhurmaghat*," or organized system of resistance by ryots against their zemindar.

With these remarks I entirely concur. The popular and current notion of dacoity is that of an outrage committed, at the very dead of night, by a band of ruffians, whose heads are covered, and whose faces are disguised by chalk or some other mixture, and who have no private enmity with the peaceable and unfortunate house-holder, whom some one of the gang has previously, by secret enquiries, marked out for a prey. But the definition in the Penal Code of dacoity is very wide. It is decidedly an extension of the old law. Section 391 of the Code says that a dacoity can be committed by five persons who conjointly commit or attempt to commit *robbery*, or when the whole number of persons who conjointly commit the robbery, or of the persons present aiding the commission or attempt, amounts to the number of five.

There can be no question that this legal description fits the act of the prisoners, as described at some length by the various witnesses.

It may be well that ryots and servants of zemindars, and native residents in the interior, should know, for the future, that persons who commit the offence popularly known as "*loot taraj*," or plunder, which is an act unfortunately involving no moral torpitude whatever in the eyes of many natives, run the chance, under the present law, of a trial and conviction for the serious crime of dacoity.

The defence in this case is, as usual, *alibis*, which were not attempted to be supported; but I am inclined to think, from the evidence of Jugeswar Bhooya, that some plea of attachment under legal process was put forward by the prisoners at the time of the attack. But no such plea was insisted on as part of the substantial defence, and the prisoners had the advantage of being defended by a pleader of the High Court at the original Sessions. The truth seems to be that, in this as in similar cases, the complainant tells his story with exaggerations, and the line of defence taken does not at all assist the Court in reducing those exaggerations to the measure of strict truth. Looking to the above facts, I see no reason to doubt that the prisoners have been justly convicted; and, had it been necessary, charges of unlawful assemblage and riot, accompanied with wounding, might have been drawn up against them.

On the other hand, I think the punishment of five years' rigorous imprisonment too severe for the offence. The act of wounding Giridhar Bhooya is shown to have been the independent act of a person not yet apprehended; and, after all, the complainant does not seem to have suffered any extraordinary losses, nor the outrage to have been of a very aggravated nature. Certainly, if very valuable property had been carried off, the complainant, aided by the Sub-Inspector, had every chance of recovering the same.

Still, these attacks, committed in broad daylight, are very prejudicial to the peace of the district, and, as committed in open violation of law, encourage an habitual resort to lawlessness, and they must be punished.

But I think the offence will be adequately met by a sentence of two years' rigorous imprisonment, to which I propose to reduce that of five years.

The papers must go to Mr. Justice Kemp.

Kemp, J.—I concur. The sentence proposed by my learned colleague is sufficiently severe to meet the requirements of the case.

The 15th August 1865.

Present:

The Hon'ble F. B. Kemp, W. S. Seton-Karr, and E. Jackson, *Judges*.

Imprisonment in default of payment of fine—Distress and Sale of moveable property (whether ordered or not by the officer inflicting the fine).

Queen *versus* Modoosoodun Day and nine others.

Referred by the Officiating Magistrate of the 24-Pergunnahs.

HELD by the majority of the Court that an offender, who has undergone the full term of imprisonment to which he was sentenced in default of the payment of a fine, is still liable to have the amount levied by distress and sale of any moveable property belonging to him which may be found within the jurisdiction of the Magistrate of the District, whether the Officer who inflicted the fine issued any special directions on the subject or not (Seton-Karr, J., dissenting).

Seton-Karr, J.—THIS case has now been argued by the Government Pleader, who points to Section 61, Criminal Procedure Code, which says that it shall be "competent "to the Court which sentences such offender, "whether or not the sentence directs that, in "default of payment of the fine, the prisoner "shall suffer imprisonment, to issue a warrant "for the levy of the amount by distress and "sale of moveable property."

A ruling of a Bench of three Judges, in reply to a reference from Monghyr, is also quoted, which clearly lays down that imprisonment, suffered in default of payment of fine, does not exempt the property of the offender from being distrained and sold.

I am quite prepared to follow this ruling in ordinary cases, and to hold that the original Deputy Magistrate, who passed the sentence of fine and imprisonment, might have ordered the fine to be levied by distraint, either at the time of the sentence, or at any subsequent time, over and above the additional imprisonment undergone by the appellants. But I am not so clear whether another Deputy Magistrate, succeeding to him, has power to make such an addition. And I am quite clear that, when he at first refused to levy the fine by distraint, the Magistrate, if he thought the ruling of the Deputy Magistrate erroneous, ought to have referred it to this Court under Section 434, and ought not himself to have overruled the Deputy Magistrate. There was no appeal to the Magistrate, and, if the release of the property was wrong in law, the proper course was to refer the matter to this Court.

Under any view of the case, I should wish this case to be laid before Mr. Justice Kemp. I have great doubts whether a fresh Deputy Magistrate, either of himself or acting under the Magistrate's orders, could practically add to a sentence passed by his predecessor. Penal laws, it seems to me, should be construed strictly; and, if a provision for distraint and sale has not been ordered by the Magistrate who originally sentenced the offender to imprisonment and fine, I do not see any way to an addition of this kind to be subsequently made by a different Magistrate.

In my view, I wish these papers to be laid before Mr. Justice Kemp.

Kemp, J.—I cannot concur with my learned colleague. An offender, who has undergone the full term of imprisonment to which he has been sentenced in default of payment of a fine, is still liable to have the amount of the fine levied by distress and sale of any moveable property belonging to him which may be found within the jurisdiction of the Magistrate of the District (*vide* Section 61 of the Code of Criminal Procedure).

The imprisonment is not to be taken as a satisfaction of the fine; nor, as it is put by the learned commentators, Morgan and Macpherson: "The offender is not permitted to choose whether he will suffer in person or in his property." There is, of course, a limitation to this process of levying the fine (*see* Section 70, Indian Penal Code). I observe that a Bench of three Judges have ruled in support of the view taken by me. The Deputy Magistrate, who first passed the sentence of fine in addition to imprisonment, passed no order, one way or the other, as to whether the fine could be levied or not under Section 61. Another Deputy Magistrate was of opinion that it could not be so. Doubtless this opinion was wrong, and the Magistrate would have acted more regularly had he referred the question to this Court under the provisions of Section 434 of the Code of Procedure. But, as the petitioners have themselves invoked the Court, and asked it to exercise its power of revision, there is nothing, in my opinion, to prevent the Court from exercising the powers vested in it by Section 404 of the Code of Procedure. I would reject the petition, and, unless the fine be paid, it must be levied by distress and sale of the moveable properties of the petitioners.

Jackson, J.—I am of opinion that, under Section 61, Criminal Procedure Code, the fine is leviable by distraint and sale of any moveable property belonging to the offender, which may be found within the jurisdiction of the Magistrate of the District; and that the fine may be levied in the mode as prescribed in that Section of the law, whether the officer who inflicted the fine issued any special directions on the subject or not. The Magistrate will be directed to proceed and levy the fine unless it is paid.

The 18th August 1865.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Forfeiture of property of absconding offender.

Bishonath Sircar, *Petitioner.*

Referred under Section 434 of the Code of Criminal Procedure, and Circular Order No. 18, dated the 15th July 1863.

Forfeiture of property of an absconding offender, who appears within two years from the attachment of his property, should not be carried into effect until after a regular enquiry into the causes of the offender's absence.

Jackson, J.—THE Sessions Judge has fully stated the facts on which this reference is based. It is not necessary to repeat them.

We do not agree in the view of the law which the Sessions Judge has taken, but are of opinion that, as far as the points of law referred to by the Sessions Judge are concerned, orders of both Mr. Assistant Magistrate Norman and Deputy Magistrate Ahmed Ali are perfectly legal. The Sessions Judge thinks that the six months, during which an absconding person's property is not to be sold, is a *locus pœnitentiæ;* and that, if he gives himself up within that time, he is entitled to a return of his attached property. But that six months has reference only to the sale of the property, and cannot be extended or applied to the accused with an effect which is not distinctly declared in the law itself. Such attached property, the law says, shall be declared to be at the disposal of the Government, if the accused does not appear within the time fixed in the proclamation; and it is for the accused, when he appears at any time within two years after the attachment, to satisfy the Magistrate that he has not been avoiding the process of the Court. It may be a doubtful question whether, if the property has not been declared to be the property of the Government before the accusd appears, it can be so declared after he has appeared. The law does not lay down any express time when the order shall be passed; and if, by mistake or inadvertence, it has not been passed before the accused appears, we think it might be passed after he has appeared. In the present case, the accused, when he did appear, did not attempt to satisfy the Court that he had not evaded justice, and Mr. Assistant Norman consequently ordered that the attached property should remain at the disposal of Government. The accused afterwards petitioned for its release, and explained the cause of his absence. The Deputy Magistrate was not satisfied with his evidence, and, holding that view correctly under the law, refused to restore it.

But, though these orders of the two officers were perfectly legal, still we think that the previous order of the Assistant ordering the processes of attachment and proclamation were illegal, as he does not anywhere record on what grounds he was satisfied that the accused was absconding or concealing himself to evade justice. These processes are not to issue whenever a warrant fails of its effect. The officer sent to serve the warrant should be examined as to the measures adopted by him to serve it; and if, on his evidence, or in any other manner, the Magistrate is satisfied that the accused is evading justice, then and then only can the processes of proclamation and attachment issue. Not only in this case does it not appear that any such enquiry was made upon which it can be held that the Magistrate satisfied himself that the accused was absconding, but it is also clear that he made a most summary and cursory enquiry as to whether the explanation of the accused, after he did appear, was sufficient to account for the non-service of the warrant. The Deputy Magistrate disbelieves the witnesses, and that is all. The clause of the law allowing the property of a person who has evaded justice to be forfeited to Government is highly penal, and certainly should not be carried into effect only when it is quite certain that the accused did really abscond. Section 185 evidently contemplates that there shall be "a trial before a competent Court," and this implies that the evidence to prove that the accused was absconding, as well as his evidence in exculpation, shall be heard in his presence, and a judicial determination shall be come to upon the points. The Deputy Magistrate did not hold any such trial, and, on this ground, we think that his final order was illegal. It is reversed, and he is directed to hold a regular trial, and thereupon determine on the restoration or confiscation of the attached property.

Seton-Karr, J.—I do not altogether concur with the Sessions Judge in holding that the penalty for evasion of the warrant could never, under any circumstances, be legally imposed after the object of the Magistrate, *i. e.*, the appearance of the accused, had been obtained. But I do concur with the Sessions Judge, and with my colleague, in thinking that the Deputy Ma-

gistrate has mis-read the order of attachment, and that the Magistrate is altogether wrong in saying that the property bacame the property of Government on the 10th of March.

On the whole, I am quite willing to consent to a reversal of the orders of the Magistrate. He should hold a new trial, and determine whether the property should or should not be released, looking as well to any evidence which may show where the prisoner was during the evasion of the warrant, as to the ultimate result of the proceedings and the acquittal of the prisoner.

The 19th August 1865.

Present:

The Hon'ble W. Morgan, F. B. Kemp, and W. S. Seton-Karr, *Judges.*

High Court as a Court of Revision—European British Subjects.

Queen *versus* Thomas Brae.

Baboo Juggadanund Mookerjee for the prosecution.

Mr. R. E. Twidale for the Prisoner.

HELD by Morgan and Kemp, *JJ.*, that there was no error of law in the record to justify the Court's interference with the Magistrate's order of release of the prisoner.

HELD by Morgan and Seton-Karr, *JJ.*, that the High Court, as a Court of Revision, under Section 404, Criminal Procedure Code, has no jurisdiction over European British subjects in criminal cases.

Kemp, J.—THE case of this gentleman has come before this Court, as a Court of Revision, under Section 404 of the Code of Criminal Procedure.

This Court, on the Criminal Side, acts as a Court of reference, of revision, and of appeal. Under Section 404 of the Criminal Procedure Code, the Court acting as a Court of Revision "may," on the report of a Court of Session, or of a Magistrate, or whenever it thinks fit, "call for the record of any criminal trial, or the record of any judicial proceedings of a Criminal Court *within its jurisdiction*, in which it shall appear to it that there has been error in the decision on a point of law, or that a point of law should be considered by this Court, and may determine any point of law arising out of the case, and thereupon pass such order as to the Court shall seem right."

In this case we have had to satisfy ourselves in the best way available to us whether Mr. Thomas Brae is a European British subject or not. The record, as sent up to us by the local authorities, does not afford any information on this point. Mr. Brae has appeared in person in this Court: he has submitted an authenticated copy of the Register of Marriages kept at St. John's Church (old Cathedral), Calcutta, and has further examined Mr. George W. Kellner; from this evidence, in the absence of anything to rebut it, we are satisfied that Mr. Thomas Brae is a European British subject.

The charge against Mr. Thomas Brae, as entered in the charge paper submitted by the Police, is that he voluntarily caused grievous hurt by means of an instrument for shooting, Section 326 of the Indian Penal Code. We note that Mr. Brae was not taken into custody, nor was any warrant issued for his apprehension. The Magistrate of Furreedpore (Mr. Walton) appears to have taken up the case in his capacity of Magistrate; his proceedings are signed "T. Walton, Officiating Magistrate."* Under the provisions of Section 37 of the Code of Criminal Procedure, Mr. Walton, as Magistrate, was competent to hold the preliminary enquiry into the present case, notwithstanding Mr. Thomas Brae could not be tried by any Court but this Court, exercising its extraordinary Original Criminal Jurisdiction. Mr. Walton being of opinion, after recording the evidence for the prosecution, and receving a written statement from the accused party, that there were not sufficient grounds for proceeding further in the case (*vide* Section 41 of the Code of Criminal Procedure), inasmuch as he held that Mr. Thomas Brae's acts were justified, on the ground that nothing is an offence which is done in the exercise of the right of private defence, recorded an order to the effect that "the charge must be abandoned, and that it was unnecessary to proceed further with the case."

*Note.—The record does not disclose that he acted in any other capacity, nor have we been shown that Mr. Walton is a Justice of the Peace.

As Mr. Walton has not acted in this case in his capacity of Justice of the Peace, it is obviously unnecessary for this Court, important as the question may be when it does arise, to give any opinion as to the question whether, in the event of his having so acted, this Court would have had jurisdiction or not to revise his proceedings.

Reverting to Sections 404 and 405 of the Criminal Procedure Code, under which alone this Court can have any jurisdiction in the

present case, I would observe that there has been "no error" in the order of the Magistrate on a "point of law" (Section 404). The order is neither illegal, nor, under all the circumstances of the case, improper. The proceedings are also regular (Section 405). I therefore decline to interfere.

Seton-Karr, J.—We have now to consider the papers in the case of Mr. Brae, who had been discharged by the Joint-Magistrate of Furreedpore, after having fired at and wounded two Natives with ball. The grounds for the discharge without any commitment were simply that Mr. Brae, whose acts of firing with ball were admitted, had acted in self-defence.

The facts of the case are clearly given in the record, and have had our full attention. The case has been argued before us by Mr. Twidale on behalf of Mr. Brae, and by the Government Pleader on the other side, both as regards the reason given for non-commitment, and as regards a very important question of the jurisdiction of this Court.

We have been asked to consider the case, under Section 404 of the Code of Criminal Procedure, as a Court of Revision; but, when the case was first argued, it was urged for Mr. Brae, for the first time apparently in the case, that he was a European British subject, and that the appellate branch of the High Court had no jurisdiction, and could not order his commitment to the Original Side of the High Court, even if we thought that he had been improperly discharged, and that he ought to have been put on his trial formally, and either acquitted or condemned by the only tribunal competent to try him for the offence with which he had been charged. On this, we gave the pleader for Mr. Brae one fortnight's time to produce evidence that his client was a European British subject, and was entitled to all the privileges of such person in regard to commitment and trial.

In the Lower Court this question had not been distinctly raised, and the presiding official of the Court had acted apparently as Magistrate, and not as Justice of the Peace. This evidence has now been adduced before us. The marriage certificate of Mr. Brae's parents, duly attested, has been put into the Court, and Mr. G. W. Kellner has sworn before us that he believes Mr. Brae to be the offspring of that marriage, and that he always understood Mr. Brae's father to have been a European British subject, as he came out to India after the age of 21. Mr. Brae himself was educated in England, and, to all appearance, is of English parentage and birth.

The Government Pleader having in no wise attempted to impugn or rebut this evidence, Mr. Brae is entitled to ask the Court to consider him as having proved his *status* of a European British subject.

Mr. Justice Kemp is of opinion that, as Mr. Walton has not acted in his capacity of Justice of the Peace, it is obviously unnecessary for this Court to give any opinion on the question whether, in the event of his having so acted, this Court would have had jurisdiction or not to revise his proceedings.

I cannot concur in this view. In my humble opinion, the question of jurisdiction is of the highest importance for this and for all other similar cases in future. And it most naturally arises, in this very case, in this way. The proceedings of any Magistrate would *primâ facie* be liable to revision for an error of law by this Court, and, if nothing appeared on record, or had been urged by Mr. Brae to show that he was a European British subject, we might consider him as amenable to the local tribunals. The law on this point, as clearly laid down in the well-known case of Calder *vs.* Halket, and followed in other cases, is that the person claiming such privileges is bound to prove them. The Court is not to assume such *status* without proof. But the claim successfully preferred by Mr. Brae to the privileges of a European British subject places the case in a new light. Mr. Brae being, in our eyes, a European British subject, it becomes most necessary to see whether, if we should think on full consideration that further proceedings should be taken, we have really the jurisdiction to order such proceedings to be taken by a Justice of the Peace. If we have not, we should stay our hand. If we have, we can then go into the reasons given by the Magistrate for discharging Mr. Brae. It is, to my thinking, clear that the question of jurisdiction fully discussed by the pleaders on both sides is, as I have said, of paramount importance. I am informed, after search in the office, that Mr. Walton, who enquired into the case, is a Justice of the Peace.

And the question, then, is simply this, *viz.*, whether our Court on the Appellate side, using the powers of revision entrusted to it by Section 404, can interfere and direct a commitment, not to the Sessions at Furreedpore, but to the Sessions at Calcutta?

The Section quoted empowers us, whenever we think fit, to call for the record of any criminal trial, or the record of any judi-

cial proceeding of a Criminal Court, other than a criminal trial, in any Court within its jurisdiction in which it shall appear that there has been error on a point of law, and determine any points of law, passing thereon such orders as may seem right. The correctness or otherwise of an acquittal founded on a view of the legal right of self-defence would, it appears to me, involve a point of law.

I have no doubt that, under this Section, if a Magistrate had improperly or illegally discharged an ordinary British subject, amenable to local jurisdiction, on a misconception of the law as to self-defence, or of the particular province of a Magistrate, and of a Judge and Assessors, or Judge and Jury, respectively, we could interfere to direct the commitment of such a person, so that he should be either acquitted or condemned by a competent tribunal having final jurisdiction in the case. We could, I hold, either order the Magistrate to enquire further, or we might, through the Sessions Judge, order him to commit to the Sessions.

I have also no doubt that the Magistrate, as Magistrate, may hold a preliminary enquiry in cases triable by a Supreme Court of judicature, *i. e.*, by the High Court on its Original Side, although a Magistrate must be a Justice of the Peace in order to commit or hold to bail a European British subject (Sections 37 and 39, Criminal Procedure Code). I am also quite clear that, by Section 25, no person, by reason of birth or descent, is exempt from the Code of Criminal Procedure, provided that he be not tried before any Criminal Court which has not jurisdiction over him. Under this law, proceedings taken in the interior under the Code of Criminal Procedure against a European British subject would obviously end in a commitment to the original side of this Court, were there grounds for a commitment.

But, after consideration of these Sections, what I have very great doubts about is, whether this Court, in its Appellate Jurisdiction, can order a commitment of a European British subject to the original, *i. e.*, to the other side of the Court. No one, I suppose, will dispute the proposition that, by law, a Local Court could not commit to the Local Sessions, nor a Sessions Judge try a European British subject, nor our Court, *on its Appellate Side*, hear and confirm an appeal from such a conviction, or deal with the case at all, except to point out the entire want of jurisdiction. The final jurisdiction of the Local Courts over European British subjects is limited to 500 rupees, and to cases of contempt of Court, by Sections 42 and 410 of the Criminal Procedure Code. But even then we have a power of revision by writ of *certiorari*, *i. e.*, of revision by the Original Side of the Court. How, then, can it be said that our Bench is competent by law to direct a Magistrate acting as Justice of the Peace, as he must act if ulterior proceedings are contemplated, to commit such a British subject to the Sessions held in Calcutta, or, what is very nearly the same thing, to take proceedings afresh with a view to such commitment? We must constantly bear in mind that, with the precise *status* and privileges now asserted by, and granted to, Mr. Brae, ulterior proceedings can have no other end in view. But, if the Appellate Court cannot, as a Court of Appeal, hear or revise the proceedings on the formal trial of a European British subject, it would seem, by parity of reasoning, that it cannot interfere to give directions that such a person ought to be tried in the only place or by the only Court in which, as the law now stands, he can take his trial.

The law is either ambiguous, or it is wholly silent on the subject. The Charter does not elucidate or throw light on the matter. Sections 21 to 28 of that deed expound what is to be the criminal jurisdiction of the Court, ordinary and extraordinary; but they do not appear to provide for this case, and they clearly contemplate the maintenance of the Original and Appellate Jurisdiction separate and distinct from each other, as they were before the amalgamation of the two Courts. I do not find anything in those Sections, which I have carefully studied, which would warrant me in saying that the law, as to venue, jurisdiction, and competence of the various Courts, has been at all changed; the High Court takes the place of the Supreme Court on one side, and of the Sudder Nizamut Adawlut on the other, but without complete fusion.

It is argued by the Government pleader, and it is not denied by the pleader for Mr. Brae, that, if there is a wrong or failure of justice, there ought to be a remedy or a means of setting the failure right. The remedy, if there has been a failure, might possibly be for the Government to move by its Advocate-General or Standing Counsel in the matter, and to direct him to apply to the Original Side of the Court, in order that further proceedings should be taken. It is possible, too, that, before the abolition of the

Grand Jury, any prosecutor or complainant, had the Magistrate refused to make a commitment, might have still had the right to apply to that body to find a true bill on a private indictment against any other person on any statutable or triable offence.

I say this, however, with some doubt as to the legal right of complainants so circumstanced. But before or since the abolition of the Grand Jury, I presume that the Law Officers of the Government might apply to the Original Side of the Court for a *mandamus*. But even here, as far as I have been able to obtain information on the subject, the *mandamus* could go no farther than to order a Justice of the Peace, who had refused to entertain a case at all, or had alleged want of jurisdiction, where he obviously had jurisdiction, to take it up. I doubt very much if the Court could or would direct a Justice of the Peace to commit an accused person whom he had discharged for reasons given, and so bring on a trial. In England, a prosecutor who cannot get redress from one Justice of the Peace may apply to another in the same country for the commitment of the accused ; but whether this sort of proceeding would be sanctioned in this country, or whether it would, on the whole, be conducive to the satisfactory administration of justice, if it could be sanctioned, may admit of question. I am strengthened in the view taken above as to the effect of a *mandamus*, by a case, in the Original Side of the High Court of Madras, reported at page 66 of Stokes's Reports. There Scotland, C.J., and Bittleston, J., refused to grant a *mandamus* to a Magistrate who had exercised his discretion, and had refused to entertain a criminal charge, and the Court seemed to think that errors of judgment could not be corrected by a writ of *mandamus*.

It is said that, with an amalgamated High Court looking to its object, these distinctions of procedure, and these doubts and difficulties of practice, ought not to occur. But all we have to do as Judges is to see whether the law confers on us jurisdiction, and most certainly in any case where the Court is asked to say if there has been a failure of justice, and to assume the power of directing action to be taken beyond the conclusions of the Local Courts, and in this case especially, involving as it does the consideration of special privileges, we ought not to move unless we are sure that we have jurisdiction; that our jurisdiction will never be called in question ; and that it will lead to legal and satisfactory results.

We cannot give ourselves jurisdiction by analogy, by force of deduction, ingenious reasoning, or preponderance of probabilities, if the law is silent.

I have thus argued this case simply to see whether we have jurisdiction, because, until we are sure of that, we ought to do nothing. I have, however, been carefully through the papers which have been duly commented on by the pleaders on both sides in open Court, and I have formed a definite opinion on the merits of the case as it stands, and on the view taken thereof by the Executive Authorities. But, if we have no jurisdiction, as in my opinion we have not, it is not necessary or expedient that I should express that opinion. The conclusion that I have arrived at is, therefore, that whatever remedy the Government, if it desires any further action, may be advised to take, we, on this side, cannot act. I have discussed this very important question from a different point of view to that taken by my learned colleague, Mr. Justice Kemp, and I have further thought it right to consider whether, granting that there had been a failure of justice, any other remedy might not exist; but my conclusion is the same as that of Mr. Justice Kemp. The Court on this side has no jurisdiction in such a case, and no power of revision under Section 404 or under any other. As, however, the whole matter is somewhat complicated, involving a mixed question of the law suited to Europeans and the law suited to ordinary British subjects, I am of opinion that it would be very desirable if this case were referred to a third Judge.

Morgan, J.—The record of Mr. Walton's proceedings, having been called for by the Court, must now be dealt with according to the provisions of Section 404 of the Code of Criminal Procedure. It is only as a member of a Court of Revision duly constituted by the High Court, and vested with the jurisdiction which formerly belonged to the Sudder Court, that I am (as I understand it) authorized and required to deal with this matter. That jurisdiction is, in the words of the 404th Section, to pass such order as to the Sudder Court shall seem right when the record called for shows either that the Magistrate's decision is erroneous in law, or that some question of law arises for decision out of the facts of the case.

The language of the Section appears to me to be hardly applicable to a Magistrate's proceeding in the conduct of a preliminary enquiry in a case triable by the Court of

Session, whether the result of such enquiry be that the accused person is sent for trial to the Court of Session, or is discharged.

The record shows that Mr. Walton, after hearing the complaint against Mr. Brae, and after examining several persons as witnesses, thought there was not sufficient ground for proceeding against the accused. Accordingly, the proceedings were dropped, and no summons or other process was issued. Seeing the nature of the offence charged, and that the acts done were admitted and justified as acts done in the exercise of the right of private defence, I think, upon the facts as stated by Mr. Walton in his written order, that the preliminary investigation ought to have been proceeded with, and that scarcely any matter that might be disclosed during its further progress could excuse the Magistrate from sending the case to a higher tribunal, in order that the circumstances, under which the accused had inflicted wounds by a gun loaded with ball, might be fully enquired into, and that the superior tribunals should determine whether or not the limits of the right of private defence had been exceeded.

I see no error in law in the record itself, although the evidence adduced in this Court may show that Mr. Walton should have acted, and should have described himself as acting, in his capacity of Justice of the Peace, and not as Magistrate of the district, nor any point of law to be determined; and it is not requisite in my opinion that we should give any further order. I think it needless to consider whether we, as a Court of Revision under Section 404, could, by our order, set the Magistrate again in motion, with a view to the committal of the accused person for trial. Mr. Brae is, it appears, a European British subject, and Mr. Walton is a Justice of the Peace; notwithstanding these facts, the proceedings of the latter were in his character of Magistrate, and they were not taken under the 41st Section of the Code. We, having ascertained that the former is a European British subject, should not, it seems to me, proceed farther as a Court of Revision under Section 404. Whatever may be the extent of our powers under that Section when dealing with a case within its scope, we can revise only "such cases tried by any officer or Court possessing Criminal Jurisdiction as (were formerly) subject to revision by the Sudder Nizamut Adawlut" (*see* Sec. 27 of the Letters Patent), and it is certain that a case in which the accused was a European British subject was not open to such revision.

The High Court possesses, by the Statute 24 and 25 Vict., Chapter 104, and by the Letters Patent, not only the power of revision and control formerly exercised by the Sudder Court, but also the powers which the Supreme Court possessed by its Charter over Justices of the Peace and others. The High Court may provide for the exercise of all or any of these powers by single Judges or Division Courts, and such Courts or Judges, if duly empowered, may exercise jurisdiction over all persons and matters as fully as the High Court itself. It does not appear to be either necessary or expedient to enquire what proceedings might, upon due application made in any case, be ordered or taken by the High Court, or by a Division Court vested with the powers of the High Court. It is enough in my opinion to say that, with our present powers, we cannot, as a Court of Revision, under the Section referred to, proceed farther.

The High Court has, I believe, ample power to control the proceedings of Justices of the Peace, and to compel them to proceed, if they improperly decline jurisdiction, and these powers it possesses in addition to the jurisdiction, Original and Appellate, vested in the Court by law.

The 28th August 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Prisoners (Pursuit of escaped) obstructing Public Servant in discharge of public functions—Jurisdiction (of Magistrate).

Dukhoo Pein *versus* Chundro Kant Chowdry, Pochai Sircar, and Kheru Poramanick.

Referred under Section 434, Code of Criminal Procedure.

Read a letter from the Sessions Judge of Rajshahye, dated the 7th August 1865.

Court peons may pursue into the yard of a lodging-house, the door leading into which is open, a prisoner who has escaped from their custody.

The offence of obstructing a public servant in the discharge of his public functions is not cognizable by a Magistrate, except with the sanction or on the complaint of the Court or public servant concerned, or, if such servant is an inferior ministerial servant, with the sanction or on the complaint of his official superior.

THE Court concurs with the Sessions Judge that the Court peons were not acting

beyond their jurisdiction in pursuing, into the yard of a lodging house, a prisoner who had escaped from their custody, the door leading into the said yard being open. The ruling laid down by the late Acting Judge is wholly erroneous, and would be very prejudicial to the interests of justice.

The Court admit that an offence punishable under Section 186 of the Indian Penal Code is not cognizable by a Magistrate, except with the sanction or on the complaint of the Court or public servant concerned, or, if such servant is an inferior ministerial servant, with the sanction or on the complaint of his official superior (*see* Section 168 of the Code of Criminal Procedure).

Had the peons simply charged the defendant with a common assault, the case might have been different.

The Court thinks that it would have saved a good deal of trouble had this plea been raised at an earlier period. As it is, they have no option but to quash the proceedings. If the Civil Court, or the public servant referred to, now sanction the prosecution, steps may be taken by the Magistrate to retry the case. But this sanction is only given on the assumption that the principal defendant, sentenced to imprisonment, has not undergone *any portion* of his imprisonment. If any portion has been undergone, no fresh trial can take place; and if the minor defendants, Pochai and Kheru, have paid their fines, they should be refunded to them.

The 29th August 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Attempt to bribe Public Servant—Illegality of sentence—Duty of Judge to explain construction of document to Jury.

Queen *versus* Setul Chunder Bagchee, *Appellant.*

Committed by the Deputy Commissioner, and tried by the Judicial Commissioner of Assam, on a charge of attempting to receive gratification for inducing, by illegal means, a public servant to show favor to a person.

A conviction on a charge of attempting to receive a gratification for influencing a public servant in the exercise of his public functions is illegal as disclosing no legal offence when it omits to state the person or persons for whom the gratification was obtained, or the public servant to be influenced in the exercise of his public functions.

A Judge ought to explain to the Jury the legal construction to be put on a document relied on by the prosecution.

Kemp, J.—THIS prisoner has been convicted by the Judicial Commissioner of Assam of the following offence :—

That he, Setul Chunder Bagchee, on or about the 12th day of Magh 1271, B. S., at Gowalparah, attempted to obtain from a person by name Kamessoree for another person or persons, *names unknown*, a gratification as a reward for inducing a public servant in the exercise of the official functions of such public servant to show favor to a person, the said Kamessoree ; and that she has thereby committed an offence punishable under Section 162 of the Indian Penal Code.

Sentence, three months' simple imprisonment, and to pay a fine of 50 rupees ; in default of payment, further imprisonment for three months.

The trial was conducted with a Jury ; the only evidence for the prosecution is a letter, which the prisoner admits to have written to his employer, by name Kamessoree. In this letter, which refers to a case in which that lady was plaintiff, occurs the following passage : "I have agreed to pay 30 rupees in the event of success. If, by God's will, we succeed, the money must be paid."

The prisoner avers that this passage refers to an arrangement which he had made with one Omesh Chunder, a pleader, to pay him 30 rupees over and above his legitimate fee in the event of success.

The Judicial Commissioner was, I think, wrong in leaving the construction of this passage in the letter, which, as I have already observed, was the only piece of evidence adduced by the prosecution, to the Jury. He ought to have explained to the Jury the legal construction to be put upon the document.

There is, however, another flaw in the conviction, which, in my opinion, wholly

vitiates it, and that is, that it discloses no legal offence.

It is not stated who the person or persons were for whom the gratification was obtained; nor who the public servant was who had to be influenced in the exercise of his official functions.

Being of opinion that the conviction is illegal, inasmuch as it discloses no legal offence, I would quash it, and direct that the prisoner, who is on bail under the orders of this Court, be released. The paper must be laid before another Judge.*

Seton-Karr, J.—I entirely concur. The letter of the prisoner disclosed no legal offence on the first charge of attempting to bribe a public servant, for no public servant's name was even mentioned; and the Judicial Commissioner ought to have pointed out to the Jury the legal effect and bearing of the sentence relied on, even if there had been sufficient evidence to go to a Jury.

Of the charge of cheating, the prisoner was acquitted by the Jury.

The conviction is quashed.

The 29th August 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Insanity.

Queen *versus* Shah Mahomed.

Committed by the Officiating Joint Magistrate, and tried by the Sessions Judge of Rungpore, on a charge of voluntarily causing grievous hurt, &c.

Procedure in the case of an insane prisoner.

THE Judge, sitting in the English Department on a review of the abstract statement of prisoners acquitted by the Sessions Judge of Zillah Rungpore for May 1865, sent for the record of this case to satisfy himself of the legality of the Sessions Judge's proceedings.

The case has been laid before this Bench for orders. We find that the prisoner Shah Mahomed was charged with voluntarily causing grievous hurt, Section 326, Indian Penal Code. The prisoner, when arraigned, remained mute, and refused to plead. The Medical Officer deposed before the Sessions Judge that the prisoner was of unsound mind; and yet, in the face of this evidence, the Sessions Judge, instead of proceeding under the provisions of Sections 389 and 390 of the Code of Criminal Procedure, went on with the trial, recording the evidence, and acquitting the prisoner of the crime on the ground of insanity, though the prisoner was admitted to be incapable of making his defence.

This Court, holding these proceedings to be illegal, quashes them, and directs the Sessions Judge to proceed under Sections 389 and 390 of the Code of Criminal Procedure. The evidence need not here be taken. The Sessions Court will give a special judgment that the accused person is of unsound mind, and incapable of making his defence, and the trial must, therefore, be postponed.

As the offence of which the prisoner is accused is not bailable, the Sessions Judge must report the case for the orders of the Local Government, the prisoner being kept in safe custody pending the orders of the Government.

The 29th August 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Fine—False charge of Theft.

Juhoorun *versus* Girdharee Ram and Nuseebun.

Referred under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

Fine is not awardable as compensation for a false charge of theft.

UNDER the circumstances stated, the Court remits the fine of 10 rupees imposed on the complainant for a false charge of theft, the law not admitting such a fine as compensation under Section 270 of the Criminal Procedure Code.

* *Note.*—Charges must describe the imputed offence as nearly as possible in the language of the Indian Penal Code. (*See* also Forms of Charges, Chapter XIII., Code of Criminal Procedure, No. 3, or Section 161 of the Indian Penal Code.)

Procedure in cases of giving False Evidence and Forgery.

No. 368.

From the Registrar of the High Court, &c., dated Calcutta, 27th April 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor and G. Loch, *Judges.*

SIR,—Having laid before the Court your predecessor's Office Memorandum No. 222, dated the 12th August last, forwarding the Deputy Magistrate's explanation and his strictures thereon, in connection with the case of Syed Affsur Ally and two others, I am directed to communicate to you the following observations of the Court.

2. Section 19, Act XXIII. of 1861, must be read with Section 171 and following Sections of the Criminal Procedure Code. Section 19 prescribes: "If there shall appear to a Court sufficient ground for sending for investigation to a Magistrate a charge described in Section 463, &c., of the Indian Penal Code, which may be preferred in respect to any deed or paper offered in evidence, the Court may send the person to the Magistrate, and the Magistrate shall receive such charge, and proceed with it under the rules for the time being in force."

3. Section 171 of the Code of Criminal Procedure enacts that, "when any Court, Civil or Criminal, is of opinion that there is sufficient ground for investigating any charge of giving false evidence or forgery, the Court, after making such preliminary enquiry as may be necessary, may send the case *for investigation* to the Magistrate having power to try or commit for trial the accused persons, and such Magistrate shall thereupon proceed according to law."

4. By Section 173 it is enacted that, in any case triable by a Court of Session exclusively, any Court of Civil Judicature before which any such offence is committed, *instead* of sending the case for *investigation* to a Magistrate, may complete the investigations itself, and commit or hold to bail the accused person to take his trial before the Court of Session.

5. When any such commitment (Section 174) is made by order of a Civil Court, the Court shall frame the charge, and shall transmit the same with the order of commitment and the record of the case to the Magistrate; and such Magistrate shall bring the case before the Court of Session, together with the witnesses for the prosecution and defence.

6. Under Act XXIII. of 1861, there is a difference of procedure in cases of giving false evidence and forgery. *In cases of the former description*, by Section 16, the Court before which the offence was committed might commit the party to take his trial, or, after making a preliminary enquiry, might send the case for investigation to any Magistrate having power to commit the accused for trial, and such Magistrate is to proceed according to law. Section 18 provides that, if the commitment be made by a Court, the Court shall frame a charge, and shall transmit the same with the order of commitment to the Magistrate, and such Magistrate shall bring the case together with the witnesses before the Court of Session; but *in respect to cases of forgery*, as described in Sections 463, 471, 475, and 476 of the Penal Code, Section 29, Act XXIII. of 1861, withheld from the Civil Court the power of direct commitment, and required the case to be sent for investigation to the Magistrate, who shall receive such charge and proceed with it under the rules for the time being in force. Section 173 of the Code of Criminal Procedure, however, permits a Civil Court, in all cases of forgery or giving false evidence triable by a Court of Session exclusively, to follow either course. The Civil Court may, under the provisions of that Section, either commit directly or send the case to the Magistrate for investigation.

7. There is a great difference in the powers of a Magistrate according to the mode in which a case is treated by the Civil Courts. If a Civil Court commit a person directly for trial, the Magistrate acts merely as a Ministerial Officer, and produces all parties and witnesses and the record before the Judge at the time of trial, and can do nothing more. If the case be sent to him for *investigation*, he acts as a Judicial Officer, enquires into the truth or falsehood of the charge, and, in the event of the evidence

being insufficient, is at liberty to discharge the accused ; or, if other people are found to be concerned in the same offence, he can bring them to trial, and frame the charge accordingly. The Court thinks, therefore, in this case, if the prisoners were not committed for trial direct by the Deputy Collector, which they do not appear to have been, the Magistrate was not restricted from making a full investigation, and committing the parties and others connected with them for trial in the Court of Session.

8. With regard to what has been said about the parties having been kept in *hajut*, though the offence was bailable, it is evident that the Deputy Magistrate considered the offence of a more heinous nature than it ultimately turned out to be. This was a mistake which might have been easily rectified had the parties applied to the Magistrate.

Lurking House Trespass and Theft—Punishment for two simultaneous Offences covered by two different sets of facts.

Extract (paras. 2 and 3) of Letter No. 378, from the Registrar of the Appellate High Court, dated the 28th April 1865.

2. In reply, I am to state that the Court is of opinion that an accused person should always be found guilty of the offence covered by the greater portion of the facts in evidence; and that the Magistrate, in the case mentioned by you, was consequently quite right in finding the prisoner guilty of lurking house trespass with intent to commit theft, but that, having so found him guilty, he was not warranted in finding the guilt of theft, which, it appears, was made up of the facts which went to prove the intention in the first offence.

3. Alluding to your reasoning upon Section 46, Code of Criminal Procedure, I am to observe that that Section contemplates two offences covered by two different sets of facts; and if two such simultaneous offences legitimately arise on the evidence, for both of which stripes form part of the punishment, they can be awarded, but not more than 30 can be inflicted. The postponement of the second sentence, if not against the letter, is against the spirit of Act VI. of 1864. The Court is of opinion that, for two such separate offences under the Penal Code, a sentence of imprisonment up to 14 years, and one of stripes, may be separately awarded.

Process of attachment of property cannot issue in cases triable under Chapter XV. of the Code of Criminal Procedure.

No. 379.

From the Registrar of the High Court, &c., dated Calcutta, 28th April 1865.

(Criminal Side.)

Present :

The Hon'ble C. B. Trevor and G. Loch, *Judges.*

Sir,—With reference to the question referred by the Magistrate of Monghyr in the Tabular Statement, submitted by you, dated 6th instant, I am directed to state that the Court is of opinion that, in cases triable under Chapter 15 of the Code of Criminal Procedure, that is, in cases punished under the Penal Code with impisonment for a period not exceeding 6 months, if a warrant has been issued under Section 260, and cannot be served, the process of attachment of property cannot issue, as the law, whether intentionally or otherwise, is silent on the point, and only speaks clearly in cases coming under Chapters 12 and 14 of that Code.

Recovery by a Judge of a fine imposed by his predecessor.

No. 428.

From the Registrar of the High Court, &c., dated Calcutta, 8th May 1865.

(Criminal Side.)

Present :

The Hon'ble C. B. Trevor, *Judge.*

Sir,—In returning to you the records forwarded with your letter No. 57, dated 18th ultimo, I am directed to state that, in the opinion of the High Court, as Judge of the Court which originally sentenced the offenders in these cases, you are, under Section 61 of the Code of Criminal Procedure, competent to issue a warrant for the levy of the amount of the fines imposed by your predecessor by distress and sale of any moveable property belonging to the convicts which may be found in Jessore.

Breach of contract of service—Enforcement of performance of an order passed by a Magistrate under Act XIII. of 1859.

No. 450.

From the Registrar of the High Court, &c., dated Calcutta, 13th May 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor and G. Loch, *Judges.*

SIR,—With reference to the question under Section 3, Act XIII. of 1859, referred in the Tabular Statement submitted by you, dated 7th March last, I am directed to inform you that the Court is of opinion that your view of the Magistrate's competency in such a case is correct. The law is very imperfect; but it may be inferred that, when the Legislature gave the Magistrate power to demand a recognizance with security for the performance of any work, it intended also to give that officer authority to enforce compliance, and to recover the penalty in case of non-compliance. If a party, therefore, after giving a recognizance with security *for the performance of the order* passed by a Magistrate, does not perform that order, the Magistrate should call upon him to show cause why the recognizance should not be estreated, and the amount of the security recovered from the sureties by the attachment and sale of their property; and, in case of their failing to show satisfactory cause, the Magistrate should then proceed to attach and sell their property.

Form of charge in a case of Culpable Homicide not amounting to murder.

Extract (para. 2) of Letter No. 452, from the Registrar of the High Court, &c., dated the 13th May 1865.

2. IN the charge against Mahomed Elim and others (Case No. 7 of Statement No. 4), Exception 4 of Section 300 of the Penal Code has not been fully set forth; but, even if it had, the description of the offence would still have been essentially defective, for causing death "without premeditation in a sudden fight, in the heat of passion, upon a sudden quarrel, and without the offender having taken undue advantage, or acted in a cruel or unusual manner," is not sufficient to constitute culpable homicide not amounting to murder. In defining that offence (as has been attempted in the charge), it is not sufficient to cite one of the exceptions which take it out of the category of murder; it is necessary also to include the element of *intention* or *knowledge*, such as is described in Section 299 of the Penal Code. This has been correctly done in the *finding*. But I am to point out that no definition at all of the offence was necessary *in the charge*, which should have simply followed the model laid down in Section 239, Act XXV. of 1861, Example 4.

Dying declarations—Belief of danger of approaching death.

Extract (para. 3) of Letter No. 454, from the Registrar of the High Court, &c., dated the 13th May 1865.

3. IF you have not already done so, the Court request that you will now point out to the Deputy Magistrate the very material omission on his part (in case No. 2) in not questioning the deceased Dossee Moochinnee as to whether she believed herself to be in danger of approaching death at the time when her dying declaration was recorded.

Appeal from order of a Subordinate Magistrate of the first class lies to the Magistrate of the District, and not to the Judge.

Extract (para. 1) of Letter No. 457, from the Registrar of the High Court, &c., dated the 13th May 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor and G. Loch, *Judges.*

IN reply to your letter No. 73 of the 21st ultimo, forwarding the correspondence held between the Sessions Judge and the Assistant Magistrate, relating to a difference of opinion between those officers, I am directed to state that Section 412 of the Code of Criminal Procedure does not authorize a Sessions Judge to try an appeal from the orders of a Subordinate Magistrate of the 1st Class, which is only appealable to the Magistrate of the District, and consequently the Judge's order, directing the release of the prisoner, was without jurisdiction and illegal. The accused person should, therefore, be re-arrested, and made to undergo the rest of the term of his imprisonment.

Giving (not fabricating) false evidence in making false verification—Commitment—Hard labor how defined under the old Regulation—Framing of charge.

Extract (paras. 2, 5, 6, 7, and 8) of Letter No. 458, from the Registrar of the High Court, &c, dated the 18th May 1865.

2. THE Court observe that the prisoner Dumsee Paray (Case No. 3 of Statement No. 4) was charged with having *fabricated false evidence* in making a false verification ; but he should, they are of opinion, have been more correctly charged with *giving false evidence*, as a reference to Sections 191 and 192 of the Penal Code will demonstrate.

5. The Court concur with your predecessor in holding that the case of Batol Dhosadh (Case No. 12 of Statement No. 4) need not have been committed by the Joint Magistrate, looking to your result of the previous trial. At the same time, the Court do not think that the Magistrate acted wrongly in making the commitment, as the other party concerned in the case has been committed to the Sessions.

6. The Court observe that the sentence passed under the old Regulation on Rookoo Singh (Case No. 15 of Statement No. 4) should not have been one of rigorous imprisonment, but one of imprisonment with labor in irons ; and as, in its present form, it is not strictly legal, they correct it, and hereby direct you to pass a fresh sentence in conformity with the above.

7. The offence, which the accused falsely charged Umurdyal Roy and others with having committed, should have been stated in the charge against Chummun Pasbad (Case No. 8 of Statement No. 5).

8. In conclusion, I am to observe that the first head of the charge against Grejadhur Brahmin and another (Case No. 13 of Statement No. 5) should have been perfect in itself, and should have referred to the Section of the Penal Code under which the offence charged is punishable. This is entered in the second head, which is not regular.

Jury (Charges to)—Abettors when present—Previous conviction.

Extract (paras. 2, 3, and 4) of Letter No. 459, from the Registrar of the High Court, &c., dated the 15th May 1865.

2. WITH advertence to your directions to the Juries in the cases* marginally noted, the Court observe that you appear to have dictated to them their verdicts.

* Gourie Sunker Dabey, Case No. 2 of Statement No. 4. Bonomalee Paul, Case No. 6 of Statement No. 5.

The Court think it necessary to remind you that it is your duty as Sessions Judge only to expound the law, and lay the evidence before the Jury in an intelligible form, leaving them entirely to determine the facts which they consider to be proved. You have, the Court observe, failed in your directions to the Jury, in Case No. 2 of Statement No. 4, to point out to them the difference between Section 380 and Section 381 of the Penal Code.

3. With reference to your directions to the Jury in the case of Jugger Nath Doss and others (Case No. 4 of Statement No. 4), wherein you state that the charge of grievous hurt cannot stand against the other three persons, I am to point out that if, as would appear from your observations, they were present abetting, they were, under Section 114 of the Penal Code, guilty of having caused grievous hurt.

4. The charge against Mooluck Chund (Case No. 10 of Statement No. 4) should have given the date of the previous conviction of the accused, as, in order to render Section 75 of the Penal Code applicable, it was necessary* that the previous offence should have been committed since the 1st January 1862, when the Penal Code became law. The Court request that you will now give the date of the conviction and of the commission of the offence on that occasion.

* *Vide* Section 40, Penal Code.

Framing of charge—Grievous Hurt.

Extract (para 4) of Letter No. 460, from the Registrar of the High Court, &c., dated the 15th May 1865.

4. THE charge in the case of Narain Mytee (Case No. 7 of Statement No. 4) should have detailed the "exceptional circumstances" mentioned in Section 335 of the Penal Code, as in its present form it could not have been thoroughly intelligible to the accused, and does not fulfil the requirements of C. O. No. 6 of 1863.

Charges against insane persons.

No. 476.

From the Registrar of the High Court, &c., dated Calcutta, 18th May 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor and G. Loch, *Judges.*

SIR,—With reference to your letter submitting, for cancelment by the Court, the commitment of Musst. Sheola on the grounds that she was of unsound mind during the entire proceedings held by the Committing Officer, and that, therefore, those proceedings were illegal *ab initio*, I am directed to inform you that the Court are of opinion that, to proceed with a charge against a lunatic, either in a preliminary investigation before a Magistrate or a Sessions Judge on trial, is equally contrary to the Code of Criminal Procedure.

The words "having jurisdiction" in Section 388 of the Code apply equally to preliminary enquiries as to lunatics before the Magistrate, and Section 194 presumes that the accused, in whose presence the complainant and his witnesses are to be examined, and who is entitled to cross-examine them, is, at the time at which those acts are done, *compos mentis*. The Court, therefore, quash the commitment made under circumstances rendering it illegal, and request that you will direct the Deputy Magistrate to deal with the lunatic under Section 390 of the Code of Criminal Procedure.

Framing of Charge—Attempt to commit Murder.

Extract (paras. 5 and 6) of Letter No. 477, from the Registrar of the Appellate High Court, dated the 19th May 1865.

5. IN the first head of the charge against Panchoo Mundul (Case No. 43 of Statement No. 5), the act should have been described by which the accused intended to prevent the child being born alive, &c. It should further have been stated that "such act was not caused in good faith for the purpose of saving the life of the mother," as without this the act charged would not amount to any criminal offence under the Penal Code.

6. The second head of the charge in the same case has not been drawn up in the words of Section 307 of the Penal Code, in accordance with the instructions laid down in Section 234 of the Code of Criminal Procedure. The text of the Code, and not the marginal abstract to Section 307 of the Penal Code, should have been followed.

Framing of charge (abetment in causing miscarriage).

Extract (para. 2) of Letter No. 478, from the Registrar of the Appellate High Court, dated the 19th May 1865.

2. IN order to render Ramchaund Doss (Trial 2, Statement 5) subject to the full punishment for the offence abetted, by the application of Section 109 of the Penal Code, the charge against him should have stated the act abetted (*i. e.*, causing the miscarriage of Chund Kaiburtin) was committed in consequence of the abetment of the accused Ramchaund Doss, no express provision being made for the punishment of such abetment.

Section 415 of the Code of Criminal Procedure (Period of appeals) not applicable to cases referred under Section 434.

Extract (para. 2) of Letter No. 480, from the Registrar of the Appellate High Court, dated the 19th May 1865.

2. THE Court take this opportunity of pointing out to you that you have misapplied the period of appeals to your Court (Section 415 of the Code of Criminal Procedure)

to cases not appealable to you, but which you may think it your duty to refer under Section 434 of the same Code; you are bound to make such references whenever any illegal sentence or order is brought to your notice.

Procedure in cases of Contempt of Court.

No. 485.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

(Criminal Side.)

Read a Letter No. 118, dated the 6th instant, from the Sessions Judge of the 24-Pergunnahs, enclosing copy of his letter to the Joint Magistrate, who had declined to take up the case of Mohesh Chunder Rai, dated the 20th May 1865.

Resolution.

THE Court observe that in pursuance of a Resolution of this Court No. 437, and dated 4th May 1865, the Sessions Judge of the 24-Pergunnahs has made the following return:—

"With reference to the Resolution of the "High Court No. 437, of the 4th instant, in "the matter of Mohesh Chunder Rai, peti-"tioner, I have the honor to enclose copy of "my letter to the Joint Magistrate, No. 47, "of the 10th February last. Mr. Garrett, "who had declined to take up the case, "replied that he found he had made a mis-"take, and therefore I recommended him to "proceed with the case. If he had declined "to proceed, I should have made a reference "to the High Court."

It appears on reading the said enclosed letter of the Sessions Judge, dated 10th February last, and the petition of Mohesh Chunder Rai to this Court, that on the 21st May 1864, nearly nine months preceding the date of the Judge's letter, Mr. Garrett was requested by the Sudder Ameen of the 24-Pergunnahs to try a charge preferred by him against four persons for intentionally omitting to attend his Court in obedience to a process requiring them to appear and give evidence.

Mr. Garrett, by an order dated the 7th June 1864, refused to entertain the charge, and sent back all papers connected with it to the Sudder Ameen's Court.

The cause in which the four persons were summoned as witnesses was heard and determined by the Sudder Ameen, and afterwards in the highest Court of appeal, all this taking place some time before the Judge's letter of the 10th February last.

No second or other charge has been made against the above-mentioned four persons before the Magistrate by the Sudder Ameen, in addition or subsequent to the charge above-mentioned, which Mr. Garrett, to use the Judge's own words, "declined to take up," now more than 12 months ago. Under these circumstances we are greatly at a loss to understand what is the case which the Judge has "recommended Mr. Garrett to proceed with." Should the Sudder Ameen receive the former charge against the petitioner with or without any of his associates, or even frame a new one in respect to the same matter before the Magistrate, Mr. Garrett will, doubtless, understand that it will be his duty to hear it, and to decide upon it judicially. But on this point we desire to express our opinion of its being extremely undesirable that stale charges of contempt of Court should be raked up against individuals long after the proceedings have terminated out of which the alleged contempt arose. The Lower Court should either at once vindicate its own dignity and authority by an exercise of the powers giving it under Section 21 of Act XXIII. of 1861, or make an immediate charge before the Magistrate, which it would then become the duty of such Magistrate to at once investigate and deal with the circumstances of each case under the law applicable to them.

The Judge is requested to forward a copy of these remarks to the Sudder Ameen and to the Magistrate.

No further order need be made on the petition.

Ordered that a copy of this Resolution be forwarded to the Sessions Judge of the 24-Pergunnahs for his information and guidance.

Fine is an additional, not an alternative, punishment for giving false evidence—Form of sentence of 7 years' transportation on a prisoner convicted under Section 376, Penal Code—Attendance of witnesses before the Sessions Court.

Extract (paras. 2, 4, and 8) of Letter No. 189, from the Registrar, Appellate High Court, dated the 25th May 1865.

2. THE sentences* passed by you on the prisoners Fatin Sheikh and Kalibur Mozoomdar (Case No. 2 of Statement No. 4) is illegal, as fine is not an *alternative* punishment for giving false evidence, but an *additional* punishment. The Court, therefore, cancel these sentences as illegal, and request that you will obtain the attendance of the prisoners, and in their presence pass proper sentences.

* Each to pay a fine of 100 rupees, and in default of payment to be imprisoned two months.

4. The Court observe that if, after convicting him under Section 376 of the Penal Code, you wished to pass a sentence of seven years' transportation on the prisoner Kali Pan (Case No. 5 of Statement No. 4) you should have first sentenced him to rigorous imprisonment for that period, and you should then, by the application of Section 59 of the Penal Code, have converted this sentence into one of transportation, as, under Section 376 of the Penal Code, you were not competent to pass a sentence of *transportation* except *for life*.

8. With reference to your remarks in the case of Nitra Chowkeedar and another, (Case No. 6 of Statement No. 4) regarding your instructions to the Magistrate, requesting him to inform his subordinates that respectable and independent witnesses should be usually sent up to the Sessions, as, under Section 125 of the Code of Criminal Procedure, Magisterial officers consider that they are precluded from sending up witnesses to the search of houses in ordinary cases, I am directed to state that, to avoid subjecting such persons to unnecessary harassment such as would arise if they were required to appear first before the Magistrate, and afterwards before the Court of Sessions, the Court request that you will instruct the Magistrate not to require the attendance of such witnesses in his own Court (unless special circumstances exist), but to take recognizances for their attendance before the Court of Sessions.

Dishonestly using, as genuine, a forged document before the Penal Code became law—Framing of charge.

No. 495.

From the Registrar of the High Court, &c., dated Calcutta, the 21st May 1862.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

SIR,—I am directed to communicate to you the following observations made by the Court, on your Sessions Statement No. 5 for the month of April last.

2. As the offences in both Courts against Tarrachund Banerjee (Case No. 1) *viz.*, fraudulently and dishonestly using, as genuine, a forged document, are stated to have been committed in 1859, and, as the Penal Code did not become law until the 1st January 1862, they should have been charged, not under the Penal Code, but under the Regulation then in force, to which alone the accused was subject. The Court also observe that, to bring this charge under Section 467 of the Penal Code, the document forged should have been one of those described in that Section, and that this should have been stated in the charge.

Form of charge in cases of Murder.

No. 506.

From the Registrar of the High Court, &c., dated Calcutta, 31st May 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

SIR,—In reply to your letter No. 84, dated the 15th instant, I am directed to state that the form of charge preferred by you for cases in which prisoners are committed for trial for murder, appears to have followed the law very closely, and needs only slight corrections. With these it will stand as follows: and is approved—"that he on or about the —— day of —— at —— committed murder by causing the death of ——, the prisoner not being deprived of the power of self-control by grave and sudden provocation, sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person, or given by any thing done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant, or given by anything done in the lawful exercise of the

right of private defence, nor in the exercise in good faith of the right of private defence of person or property exceeding the powers given to him by law, and causing the death of the person against whom he was exercising such right of defence without premeditation, and without any intention of doing more harm than was necessary for the purpose of such defence, nor being a public servant or aiding a public servant acting for the advancement of public justice, and exceeding the powers given to him by law, caused the death of————by doing an act which he, in good faith, believed to be lawful, and necessary for the due discharge of his duty as such public servant, and without ill-will towards the said ———— whose death was caused nor did he cause the death of the said ———— without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without having taken undue advantage, or acted in a cruel or unusual manner, nor did the said———being above 18 years of age suffer death, or take the risk of death with his own consent (or in case the murdered person was not 18 years of age, then in lieu of the last sentence, the following, *viz.*, and the said——was under the age of 18 years) and that he has thereby," &c.

Framing of charge in the case of offences punishable in the same manner as giving or fabricating False Evidence, or as Forgery.

Extract (para. 23) of letter No. 512, from the Registrar of the Appellate High Court, dated the 6th June 1865.

(Criminal Side.)

Present :

The Hon'ble C. B. Trevor, *Judge.*

3. In the case of Oodun Lall (Trial No. 3 of Statement No. 4) the offence named in the first charge, "Corruptly using, as genuine evidence, certain documents which he knew to be fabricated," is not punishable under Section 196 of the Indian Penal Code alone: for that Section specifies no punishments but simply declares that the offender shall be punished "in the same manner as if he gave or fabricated false evidence." It was necessary, therefore, to refer to the Section under which *giving or fabricating false evidence* is punishable (that is to say, to Section 193, or some other Section of the Penal Code of a similar nature,) which should have been coupled with Section 196 in the first head of the charge. Similarly, the second offence charged, which is punishable *in the same manner as forgery* of the document to which the offence related, should not have been laid under Section 471 alone, but under that Section coupled with Section 465 or with Sections 466 or 467 according to the nature of the document used.

Belief of a prisoner's unsupported statement against evidence.

Extract (para. 4) of letter No. 513 from the Registrar of the Appellate High Court, dated the 6th June 1865.

(Criminal Side.)

Present :

The Hon'ble C. B. Trevor, *Judge.*

4. I am also to remark that the judgment in the case of Bhuggobuttee Kusbee (Case No. 2 of Statement No. 5) seems to the Court to be very extraordinary, inasmuch as, notwithstanding that a bond was actually produced and authenticated proving the purchase of Elno Bewa *alias* Surrosutta, Mr. Dodgson believed the prisoner's unsupported story that the minor went home with her on a visit.

Framing of charge under Section 149, Penal Code, relating to the commission of an offence while being a member of an Unlawful Assembly.

Extract (para. 4) of letter No. 516, from the Registrar of the Appellate High Court, dated the 6th June 1865.

(Criminal Side.)

Present :

The Hon'ble C. B. Trevor, *Judge.*

4. In regard to the fifth head of the charge in the same case, which the Court observe was drawn up and added by you, I am to point out that the act of committing culpable homicide or any other offence while being a member of an unlawful assembly, would not alone render the offender subject to the provisions of Section 149 of the Penal Code. The offence, as you will find on reference to that Section, must have been committed in *prosecution of the common object of that assembly, or have been such as the members of that assembly knew to be likely to be committed in prosecution of that object.*

Framing of charge of abduction of a woman to compel her marriage.

Extract (paras. 2 and 3) of Letter No. 518, from the Registrar of the Appellate High Court, dated the 6th June 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

2. In the first head of the charge against Thonaoollah (Case No. 2) the name of the person whom it was intended to have compelled Musst. Bhoola to marry should have been specified.

3. The offence charged in the second head of the charge in this case is not, as stated therein, punishable under Section 124 of the Penal Code. The charge should rather have set forth that, as the prisoner was present abetting the abduction of Musst. Bhoola with intent that she might be compelled to marry ——— against her will, he, under Section 114 of the Penal Code, committed the said abduction—an offence punishable under Section 366 of the Penal Code, and within the cognizance of the Court of Session.

Former conviction or acquittal bars prosecution for same act charged on a less offence.

No. 519.

From the Registrar of the High Court, &c., dated Calcutta, the 7th June 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, G. Loch, and W. Morgan, *Judges.*

SIR,—With reference to your letter No. 25, dated the 1st ultimo, submitting in tabular form a question mooted by the Officiating Joint-Magistrate under Section 55 of the Code of Criminal Procedure, as to whether a fresh prosecution on a charge of abetment of theft can be brought against a person who has been tried and convicted of the particular theft, but released on appeal on the same evidence, I am directed to state that the Court considers the opinion expressed by yourself and the Magistrate on the subject to be correct. In order to enable a person to plead successfully *autrefois acquit autrefois convict*, the prior acquittal or conviction must have been for the *same identical* offence; but, notwithstanding this, the proposition holds "that a former conviction or acquittal of a higher offence is a bar to a prosecution for the same act charged on a less offence, if, on the trial of the former, the accused might have been, upon any competent evidence, legally convicted of the latter."

2. As the facts of the case which forms the occasion of your reference fall within the above proposition, the second trial appears to the Court to be barred, and the plea of *autrefois acquit* must be successful. But I am to state that, if on appeal the Court should find that the evidence, though not supporting the conviction for theft, was legally sufficient for a conviction for abetment of theft, the order of the Lower Court should not be reversed, but its finding should be altered so as to agree with the evidence.

Realization of Fines—Section 70, Penal Code.

Extract (paras. 1 and 2) of Letter No. 540, from the Registrar of the High Court, &c., dated the 12th June 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

1. I am directed to acknowledge the receipt of your memo. No. 25, dated the 25th ultimo, containing observations on the Court's Resolution upon your Criminal Report for 1864.

2. Adverting to your remark in paragraph 6, that 100 rupees of the outstanding balance of fines was due from one "who had no means to pay up," I am to draw your attention to Section 70 of the Penal Code, which provides for the realization of the fine "at any time within six years on the passing of the sentence," so that property acquired, even after the release of a prisoner, would be liable for the fine to the end of the period specified.

of such witnesses as appears from the record of the preliminary enquiry before the Magistrate to be irrelevant or mere hearsay.

2. It is necessary, however, to exercise the greatest care in disallowing any request made by a prisoner under trial before a Sessions Court, for the examination of any witness cited by him to the fact; and the reasons for such a measure should be clearly stated in your judgment so as to satisfy the Court should any appeal be preferred in the case.

Criminal Breach of Trust in respect of property entrusted to accused as a Servant—Framing of charge.

Extract (para. 2) of Letter No. 627, from the Registrar of the High Court, &c., dated the 6th July 1865.

2. THE Court observe that the criminal breach of trust charged against Emam Ali (Case No. 1 of Statement No. 4) must, in order to constitute the offence specified in Section 408 of the Penal Code, have been committed in *respect of the property entrusted to him as a servant.* The charge which omitted this point is, therefore, imperfect; but from your judgment it would appear that this did form portion of the offence of which the prisoner was convicted.

Abettors present are principals of the second degree—Abetment—Sentence of Transportation otherwise than for life under Section 412, Penal Code.

Extracts (paras. 2, 3, 4, and 5) of Letter No. 632, from the Registrar of the High Court, &c., dated the 6th July 1865.

2. As it appears from your judgment in Case No. 1 of Statement No. 4 that the accused, Sree Ram Chuckerbutty, charged with abetment (Section 109 of the Penal Code) of grievous hurt in the second head of the charge, was present, abetting the grievous hurt, the provisions of Section 114 of the Penal Code should have been applied to his case. He should accordingly have been charged, and upon the facts stated by you should have been convicted of grievous hurt, being a principal of the second degree.

3. With reference to the charge against Hissamoodin Sheikh (Case No. 7 of Statement No. 4), the Court observe that the mere "voluntarily causing" a person to commit an offence is not sufficient to constitute abetment of that offence. It is the voluntarily causing by wilful misrepresentation, or by wilful concealment of a material fact which a person is bound to disclose, that constitutes such instigation as amounts to abetment (*vide* Explanation 1, Section 107 of the Penal Code). It would have been sufficient had the prisoner been simply charged with abetment of the particular offence. The Court also observes that abetment of the offence set forth in Section 197 of the Penal Code is not punishable under Section 109 or Section 199 of the Penal Code, but under those Sections applied to Section 193.

4. In the case of Doorga Churn Rai and another (Case No. 8 of Statement No. 4), the Court observe that sentence of transportation, otherwise than for life, cannot be passed under Section 412 of the Penal Code. In this case the prisoners should have been sentenced to rigorous imprisonment for seven years, and this sentence should then, under Section 59 of the Penal Code, have been converted into one of transportation.

5. The charge against Gyaram Chuckerbutty (Case No. 4 of Statement No. 5) is wholly incorrect, and describes no offence, inasmuch as the mere making a statement before a Court of Justice on solemn affirmation is not an offence under Section 193 of the Penal Code, unless that statement be *false, and the person making it knows or believes it to be false, or does not believe it to be true.*

Using, as genuine, a forged Deed of Sale.

Extract (para. 2) of Letter No. 633, from the Registrar of the High Court, &c., dated the 7th July 1865.

2. As Section 471 of the Penal Code prescribes no definite punishment for the offence charged against Langtoo Roy (Case No. 2 of Statement No. 4), it should have been coupled with one of the Sections immediately preceding. In the present case, as the document purported to be a deed of sale, *i. e.*, a valuable security, the Section to be referred to appears to have been Section 467. The charge should, under Section 244 of the Code of Criminal Procedure, have been amended by you. The finding is correct

Conversion of Imprisonment into Transportation—The term "plaintiff" inapplicable to Criminal Appeals—Charge of taking away a married woman with a criminal intent by whom to be made—Wrongful confinement under Section 346, Penal Code, how to be described.

Extract (paras. 2 and 3) of Letter No. 643, from the Registrar of the High Court, &c., dated the 10th July 1865.

2. As under the terms of Section 59 of the Penal Code, imprisonment can be converted into transportation only in a case in which the offender has been sentenced to at least seven years' imprisonment, the sentences passed by you on Tonoram Mali, Hurchunder Mali, Sonaton Mali, Ram Chand Mali, Govind Dass, Ramkishen Bayhal, Khurshal Chunder Dey (in Trials Nos. 1, 2, and 3, and Statement No. 4), are altogether illegal, inasmuch as you have converted into transportation sentences of imprisonment for terms less than seven years. It is not sufficient that the sentences in the three cases amount to more than seven years: for the Court have more than once held that Section 59 of the Penal Code does not apply to any sentence unless that particular sentence be one of imprisonment for more than seven years. As the prisoners' appeal is now before the Court, the sentences, if confirmed, will doubtless receive amendment.

3. The term *plaintiff* used in the charge against Kala Chand *alias* Kaloo and another (Case No. 4 of the same Statement) is, I am to observe, inapplicable to Criminal and especially to Sessions trials, inasmuch as it refers wholly to Civil actions. With reference to the fourth head of the charge in the case, wherein it is stated that the accused had taken away plaintiff, a married woman, from her husband's residence, with intent that she might have illicit intercourse with some person or persons, the Court observe that a charge, under Section 498 of the Penal Code, made by a woman herself, or by any other person than her husband, or by the person having care of such woman, on behalf of her husband, is inadmissible under Section 178 of the Code of Criminal Procedure. As, however, you have not convicted under Section 498 of the Penal Code, such an irregularity, even if it exist in this trial, would be immaterial. It should, however, be poined out to Mr. Clay, the Committing Officer. As regards the offence charged in the fifth head of the charge in the same case, the Court remark that it is not described in the terms of Section 346 of the Penal Code, but in those of the marginal abstract. This does not fully comply with the requirements of Section 234 of the Code of Criminal Procedure, which directs that "the charge shall describe the imputed "offence as *nearly as possible* in the language "of the Indian Penal Code."

Legal majority of jurors—Counterfeit Coin (Framing of charge)—Judgment of Court—Absence of Witnesses for prosecution not to be commented on in charge to Jury.

Extract (paras. 2, 4, and 5) of Letter No. 648, from the Registrar of the High Court, &c., dated the 10th July 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

2. THE mode in which the finding in the case of Omakant Chuckerbutty and another (Case No. 1 of Statement No. 4) arrived at was wholly irregular. The prisoners apparently were charged with dacoity, theft, and abetment of house-trespass. Four out of the seven persons, that is to say, no legal majority of the Jurors, convicted the prisoners of dacoity, the minority convicting them of theft only; and because, in order to constitute the offence of dacoity, it is generally necessary that theft should be committed, a unanimous verdict of conviction for the theft was constructed by your predecessors. This was far from regular. The Jury should rather have been called upon to retire to consider a verdict on the charge of theft, when most probably the result anticipated by your predecessor would have been formally arrived at. If no legal majority could have been obtained, the procedure laid down in Section 357 of the Code of Criminal Procedure should have followed.

4. In the three heads of the charge against Mohun Tewaree (Case No. 4 of Statement No. 4) the nature of the counterfeit coin which he delivered to Shomitra Bewa as genuine should have been mentioned. The Court observe that the judgment in this case does not satisfy their requirements, which are a short statement of the facts of the case and a summing up of the points on which the finding is based.

5. If the evidence of Meah Khan and three others, noticed in the charge to the Jury, in the case of Sundea Bewa, &c. (Case No. 5 of Statement No. 5), as not having been

called to give evidence, was considered essential to the just decision of that case, they should have been summoned under Section 367 of the Code of Criminal Procedure, the trial being adjourned under Section 377 of that Code. It was not proper, in addressing the Jury, to comment on the absence of these men, or to draw inferences therefrom unfavorable to the case for the prosecution.

Examination of accused to be taken down in his own vernacular, as well as that of the Magistrate.

No. 651.

From the Registrar of the High Court, &c., dated Calcutta, the 10th July 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor and G. Loch, *Judges.*

SIR,—I am directed to acknowledge the receipt of your Tabular Memo. No. 40, dated the 13th ultimo, in which you refer for the Court's opinion the question, whether, under Section 205 of the Code of Criminal Procedure, the examination of an accused person should be taken down in his own vernacular, or in that of the presiding officer.

2. In reply, I am state that it seems to the Court that the Officiating Magistrate is right. The Local Government has, under Section 196 of Act XXV. of 1861, directed the *evidence of the witnesses* to be recorded in the vernacular of the Magistrate; but this does not interfere with Section 205, according to which the examination of the accused is to be recorded "in full," and to be "shown or read to him," evidently indicating that it is to be recorded in the language in which it is delivered by the accused. If the examination be taken down in the language of the accused, and he can read, it will be *shown* to him, and he will be able to read it for himself. If he cannot read, it will be *read* to him. These words appear to the Court to demonstrate clearly that the examination is to be taken down in the language of the accused.

To constitute a sufficient cause for the non-attendance of a Witness, there must be some impossibility, moral or physical, to his production—A charge of Murder should not omit the fact of death or the name of the deceased.

Extract (paras 2 and 3) of Letter No. 653, from the Registrar, Appellate High Court, dated the 11th July 1865.

(Criminal Side.)

Present:

The Honb'ble C. B. Trevor, *Judge.*

2. With reference to the Judge's remark in the case of Sulea and others (Case No. 1 of Statement No. 4), that the Inspector could not be produced before the Sessions Court in consequence of his being engaged in investigating another heavy dacoity, the Court remark that his being so engaged should not have satisfied the Judge that his attendance could not be procured. In order to constitute a sufficient cause for the non-attendance of any witness, there must be some impossibility, moral or physical, to his production. In the present case, the Judge would have shown more discretion had he adjourned the case until the Inspector could attend.

3. The charge in the case of Tipoo (Case No. 2 of Statement No. 4) has been very imperfectly drawn up, inasmuch as no mention has been made of the provisos to Exception 1, Section 300 of the Penal Code, and the 2nd and 3rd Exceptions have been only partially set forth. The Court observe that the mere doing an act with the intention of causing death could not constitute culpable homicide or murder, unless death was caused by that act. The charge which omits the most important point, and also the name of the deceased, is altogether defective. The above remark applies *mutatis mutandis* to the case of Newaz Khan, Constable (Case No. 11 of Statement No. 4). These points should be brought to the notice of the Committing Officer.

Finding to describe accurately the description of Culpable Homicide not amounting to Murder of which a prisoner is convicted—Abettor present when offence committed—Judge is bound, after conviction, to pass some sentence.

Extracts (paras. 2, 3, and 6) of Letter No. 654, from the Registrar, Appellate High Court, dated the 11th July 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

2. THE Court observe that the requirements of Circular Order No. 6, dated the 11th March 1863, have not been fully complied with in the case of Cachareea and others (Case No. 8), inasmuch as the finding has failed to describe accurately the description of culpable homicide not amounting to murder, of which the prisoner was convicted. It is presumed that the culpable homicide for which the conviction was recorded was, for an act causing death, done with the knowledge that it was likely to cause death, but without any intention to cause death or such bodily injury as was likely to cause death. In order to render Section 109 of the Penal Code applicable to the second head of the charge in this case, it should have been set forth therein, and proved in evidence that the act abetted, *viz.*, the culpable homicide not amounting to murder of one Seetmul, was committed in consequence of the abetment of the accused.

3. In your directions to the Jury in the above case, you observe that there appears no reliable evidence that the accused Kupula struck the deceased at all, but both he and the other four prisoners seem to have abetted the offence committed, and to have been present when the culpable homicide (the act abetted) was committed. Under such circumstances, they should not have been convicted of abetment under Section 109 of the Penal Code, but by the application of Section 114 of the Code they should have been convicted and sentenced for culpable homicide not amounting to murder.

6. In conclusion, the Court observe that you were bound to pass *some sentence*, however slight, on the prisoner Poran in Case No. 27. As the powers of remitting criminal sentences is reposed solely on the Government, you acted wholly without authority in, after his conviction, warning and discharging him.

Charge to state that a dao is an instrument for cutting—Substitution of Transportation for Imprisonment.

Extracts (paras. 2 and 3) of Letter No. 667, from the Registrar of the Appellate High Court, dated the 13th July 1865.

2. WITH reference to the 1st and 3rd heads of the charge against Ram Coomar Haldar (Case No. 1), the Court observe that, though a *dao* is certainly an instrument for cutting, yet the fact should have been stated therein so as to make the charge comply in all respects with the instructions laid down in Section 234 of the Code of Criminal Procedure.

3. As, under the terms of Section 59 of the Penal Code, imprisonment can be converted into transportation only in a case in which the offender has been sentenced to at least seven years' transportation, the sentences passed by you on the prisoner Ram Coomar Haldar are altogether illegal, inasmuch as you have converted into transportation sentences of imprisonment for terms of less than seven years. It is not sufficient that the three sentences amount in the aggregate to more than seven years, for the Court have more than once held that Section 59 of the Penal Code will not apply to any sentence unless that particular sentence be one of imprisonment for more than seven years. Under these circumstances, the Court annul, as illegal, these sentences, and direct that, in accordance with the law as explained in the foregoing, fresh sentences be passed upon the said Ram Coomar Haldar.

Culpable Homicide and Grievous Hurt to be separately charged—Same offences when committed by Members of an Unlawful Assembly.

Extract (para. 2) of Letter No. 675, from the Registrar of the Appellate High Court, dated the 15th July 1865.

2. WITH reference to the charge against Basisht Sing and another (Case No. 2 of Statement No. 4), the Court observe that the culpable homicide of Kankun, and the severe wounding (by which the Court understand the grievous hurt) of Askurrun, being *distinct* acts, should have been charged in separate heads of the charge. It should also have been expressly stated that the culpable homicide and the grievous hurt were committed by some of the members of the unlawful assembly.

Committing mischief by fire, with the intention of causing the destruction of a building, &c.—Complainants are witnesses—Procedure when Complainants are absent, and their evidence is necessary.

Extracts (paras. 4 and 6) of Letter No. 688, from the Registrar of the Appellate High Court, dated the 18th July 1865.

4. THE Court observe that, though the charge against Narain Jena (Case No. 4 of Statement No. 4) is not altogether bad, yet it does not comply strictly with the requirements of Section 234 of the Code of Criminal Procedure, inasmuch as it does not describe the imputed offence as nearly as possible in the language of Section 436 of the Penal Code. The offence is not intentionally committing mischief by fire, and thereby causing the destruction of a building, &c., but committing mischief by fire, with *the intention* of causing the destruction of a building, &c. The intention, it should be observed, is a most important element in such a charge.

6. In respect to your remarks made in your judgment in the case of Kalee Sahoo and others (Case No. 3 of Statement No. 5), that the two complainants, who are the chief witnesses, managed to get away before the case came on for hearing, and as they were complainants and not witnesses, their depositions before the Magistrate could not be taken in evidence before you, the Court observe that you are quite mistaken in your interpretation of the law in this respect, as Government is the prosecutor in Sessions Courts, and persons in the position of complainants are, in fact, witnesses. In regard to the remark in a subsequent portion of your judgment in this case, "that there is no doubt at all that the plaintiffs were robbed, as they stated, and had they been here to appear as witnesses, the cause might have terminated differently," the Court observe that you should have adjourned the Court under Section 377 of the Code of Criminal Procedure, if you considered the evidence of the prosecutors (not plaintiffs) necessary, and if, after due and diligent search, their attendance could not be procured, then you should have used, as evidence before you, their deposition given before the Magistrate. Had you acted in this manner, on which the law is clear, the result of the trial would probably not have been an acquittal..

Charge of making a false document—Judge bound to direct the Jury on points of law, and to act on his view of the law.

Extracts (paras. 3 and 5) of Letter No. 689, from the Registrar of the Appellate High Court, dated the 18th July 1865.

3. WITH reference to the first head of the charge in the case of Umbica Churn Sircar and another (Case No 12 of Statement No. 5) I am to observe that it would have been preferable had the Committing Officer adhered more closely to the terms of Section 467 in drawing up the charge: for in attempting to define *forgery* (which was not necessary) he has given only a portion of the definition of what constitutes *making a false document*, which does not *per se*, even in its full definition, amount to forgery, as he will find on a close examination of Sections 463 and 464 of the Penal Code.

5. In conclusion, the Court observe, with reference to your extra-judicial remarks at the conclusion of your directions to the Jury in the case, that you are bound to direct the Jury on points of law. If you had adopted the course you mention, *viz.*, "in the event of a finding by the Jury upon the facts adverse to the accused, to reserve judgment pending reference to the High Court upon the question of law," you would have acted erroneously. You were bound to act on your view of the law, and if that were found to be incorrect, it could always be corrected either on appeal or on revision.

Bodily suffering no ground for compensation under Section 44, Code of Criminal Procedure.

Extract (para. 3) of Letter No. 691, from the Registrar of the Appellate High Court, dated the 18th July 1865.

3. ALLUDING to the case of Lochun Singh (Trial No. 3 of Statement No. 4), I am to point out that, in ordering the fine to be paid as compensation to the injured party for the suffering he has undergone, you have explicitly put the compensation on a wrong ground, for Section 44 of the Code of Criminal Procedure does not recognize bodily "suffering" as a ground for *pecuniary* compensation. The Court on appeal has apparently found that the compensation has been given to the prosecutor for the pecuniary loss which he may have suffered by the offence.

An Assistant Magistrate acts without jurisdiction in allowing withdrawal of charge of Adultery with a view to a compromise.

No. 725.

From the Registrar of the High Court, &c., dated Calcutta, the 26th July 1865.

(Criminal Side.)

Present :

The Hon'ble C. B. Trevor, *Judge.*

WITH reference to your Memo. No. 201, dated the 14th instant, forwarding, under Section 434 of the Code of Criminal Procedure and Circular Order No. 18, dated the 15th July 1863, a letter from the Officiating Magistrate of the 24-Pergunnahs, and the records of the case marginally noted, which the Assistant Magistrate has allowed to be withdrawn on the ground that Adultery may form the subject of a Civil action, and so may be compromised; I am directed to state that, as the Assistant Magistrate's order was without jurisdiction, and as both Rape (Section 376 of the Penal Code) and Adultery (Section 497 of the Penal Code) are triable exclusively by the Court of Session, you have full authority to proceed under Section 435 of the Code of Criminal Procedure. The Court do not, therefore, think that there is any necessity for their interference.

S. R. Huges *versus* G. A. Smith. Charge—Adultery.

2. The proceedings forwarded with your letter are herewith returned.

Imprisonment in default of payment of fine is a punishment for the default, and not a substitute for the fine.

No. 726.

From the Registrar of the High Court, &c., dated Calcutta, the 26th July 1865.

(Criminal Side.)

Present :

The Hon'ble C. B. Trevor, *Judge.*

SIR,—As in para. 4 of the Magistrate's letter No. 237, dated 15th instant, forwarded without comment by your Memorandum No. 81 of the 17th idem, the Magistrate appears erroneously to think that, in a case in which "imprisonment has been suffered in default "of payment" of fine, that fine cannot be realized, the Court direct me to request that you will call his attention to the provisions of Section 70 of the Penal Code, from which it appears clearly that the imprisonment, which a Court is authorized to impose in default of payment, is a punishment for the default, and not a substitute for the fine imposed, and he should adopt measures at once to give effect to the law.

Witnesses not cited for the prosecution, but considered material by the Court, should be summoned to appear.

Extract (para. 2) of Letter No. 733, from the Registrar of the High Court, &c., dated the 27th July 1865.

2. WITH reference to that portion of your judgment in the case of Aymutullah and others (Case No. 1) in which you comment on the absence of the witnesses to the search of the prisoners' houses, the Court observe that the fact that Abbass and the Head Constable, who conducted the search of the prisoners' houses, were not cited as witnesses for the prosecution, was immaterial; but, if you considered that their evidence was necessary for the proper decision of the case, you should, under Section 377 of the Code of Criminal Procedure, have adjourned the trial, and, under Section 367 of that Code, should have summoned them to appear. In a similar way you should have obtained the list of the property given to the Police by the complainant.

Limit of imprisonment for the offence of attempting to fabricate false evidence—Framing of charge in a case of Theft and Receiving stolen property.

Extracts (paras. 4 and 5) of Letter No. 750, from the Registrar of the High Court, &c., dated the 31st July 1865.

4. THE sentences passed by you on Soonder Putnaik and Nimoo Potee (Case No. 19 of Statement No. 4) are illegal by reason of their being in excess of the limit allowed on conviction of the offence of attempting to fabricate false evidence. Such a sentence cannot exceed 3½ years, inasmuch as Section 511 of the Penal Code limits imprisonment

for an attempt to one-half of the longest term provided for the substantive offence, which, in this case, would be half of 7 years, or 3½ years. Under these circumstances, the Court cancel this sentence as illegal, and direct that you will pass a fresh sentence.

5. The Court observe that you have convicted and sentenced the accused Gouree Savat (Case No. 20 of Statement No. 4) for receiving stolen property (Section 411 of the Penal Code) when the second head of the charge was *only* for *theft* (Section 379 of the Penal Code). As the punishment for both theft (379) and receiving stolen property (411) is the same, the Court do not consider that any interference is necessary; but they remark that, by adding an additional head, you should have amended the charge under Section 244 of the Code of Criminal Procedure, when you saw what the offence was likely to be.

Framing of charge of abetment.

Extract (para. 2) of Letter No. 776, from the Registrar of the High Court, &c., dated the 7th August 1865.

2. The abetment charged in the second head of the charge against Haradhone Dutt and another (Case No. 1 of Statement No. 5) has not been correctly described. It was not absolutely necessary to enter into the definition of abetment, but, if the charge attempted to give such a definition, which would probably be more intelligible to the accused, it should be accurately rendered. It is the *intentional* aiding by an illegal act or omission of the commission of an offence that constitutes one kind of abetment (Section 107, Clause 3, Penal Code), whereas the charge omits the very important element of *intention*.

No one bound to give information of a Murder —Compensation to each of several individuals to be specified.

Extracts (paras. 2 and 8) of Letter No. 777, from the Registrar of the High Court, &c., dated the 7th August 1865.

2. The Court observe that the amended charge against Beechun Mundle (Case No. 2 of Statement No. 4), and the finding based thereon, were incorrect, as there is no law which *binds* a person to give information of a murder. I am to request that you will send the record of this case for the Court's inspection.

8. The Court observe that, in the last-mentioned case, the Judge writes "that the Magistrate will be directed to apply a portion of the fine imposed on the principal offenders when realized to making compensation for those from whom the tax was levied for the sums actually taken from them, and for the loss incurred in consequence." The specific sums to be paid to each individual should always be distinctly stated in the body of the order when directing that compensations be granted, otherwise mistakes may occur, which should be carefully avoided.

No one bound to give information regarding an ordinary theft.

Extract (para. 4) of Letter No. 779, from the Registrar of the High Court, &c., dated the 7th August 1865.

4. With reference to the last Clause of the charge against the prisoner Zinatoollah Sirdar in the above-mentioned case, the Court observe that, as there is no law (Section 138 of the Code of Criminal Procedure) which compels a man to give information regarding the commission of an ordinary theft (Sections 379 and 380 of the Penal Code) which may come to his knowledge, the accused person was not legally bound to give this information, and could not have been punished for the omission, which constitutes no offence. It would be different if the omission concerned the commission of house-breaking (Section 457 of the Penal Code). These remarks apply equally to the last portion of your address to the Jury in the case.

No legal provision for realization of fines imposed for breach of Salt Laws.

Extract (para. 2) of Letter No. 783, from the Registrar of the High Court, &c., dated the 7th August 1865.

2. Adverting to para. 3 of your letter, I am to request that you will write off the fines imposed for breach of the Salt Laws, in default of which the parties are undergoing imprisonment, as there is no special provision of the law for the realization of such fines.

Imprisonment in default of payment of fine does not absolve from liability to the levy of the fine by distress and sale of moveable property.

No. 789.

From the Registrar of the High Court, &c., dated Calcutta, the 8th August 1865.

SIR,—WITH reference to the Tabular Statement, dated the 15th May last, submitted by the Magistrate of Monghyr through you, regarding a question raised under Section 61 of the Code of Criminal Procedure, as to whether an offender, who has undergone the full term of imprisonment to which he has been sentenced in default of payment of fine, is liable to have the amount of the fine levied by distress and sale of any moveable property which may be found within the jurisdiction of the Magistrate of the District, I am directed to observe that the imprisonment, which the Court is authorized to impose in default of payment of fine, is intended as a punishment for non-payment, and not as a satisfaction of the amount due. It follows, therefore, that the fine can be levied under Section 61 of the Code mentioned, even though the alternative sentence of imprisonment may have been undergone. Due regard should, however, be paid to the limitation fixed by Section 70, Penal Code.

Trial of subordinate prisoners not to be deferred, because the principal offenders have not been apprehended.

Extracts (paras. 2 and 3) of Letter No. 795, dated the 10th August 1865.

2. THE attention of the Joint-Magistrate should be drawn to Section 224 of the Code of Criminal Procedure. If the proceedings have been completed against a prisoner, the decision of the case should not be deferred, because they are merely subordinate prisoners, and because the principal offenders have not been apprehended. A trial should be adjourned only when there is a probability of obtaining additional evidence against an accused.

3. If, in another case, a prosecution for giving false evidence had been instituted, proceedings should not have been stayed, because the original case in which the false evidence was given is on appeal. The order of an Appellate Court could not affect any prosecution for such an offence.

Diet-money of persons directed to be confined in the Civil Jail, under Section 21, Act XXIII. of 1861, for contempt of Court.

No. 2728.

From the Registrar of the High Court, &c., dated Calcutta, the 12th August 1865.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

IN reply to your letter No. 148 of the 7th ultimo, I am directed to state that you acted rightly in ordering reference to be made to the Collector for the payment of the diet-money of a person directed to be confined in the Civil Jail under Section 21 of Act XXIII. of 1861. As the punishment was for a contempt, the Government are bound to supply him with rations in the same way as they are supplied to prisoners in the Criminal Jail.

Jurisdiction of Judge under Section 435, Criminal Procedure Code—No acquittal without trial—Power of Magistrate to allow a fresh prosecution.

No. 802.

From the Registrar of the High Court, &c., dated Calcutta, the 15th August 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Officiating Chief Justice*, and the Hon'ble G. Loch and H. V. Bayley, *Judges*.

SIR,—I AM directed to acknowledge the receipt of your letter No. 44, dated 24th June

last, submitting for the opinion of the Court certain questions regarding your power to deal with a case now before you, and, in reply, I am to communicate to you the following remarks of the Court for your guidance.

2. It appears that a Deputy Magistrate, exercising the full powers of a Magistrate, after hearing the evidence of the witnesses produced by the prosecutor, and without formally charging the accused, dismissed the charge instituted under Section 161, Indian Penal Code. Your letter describes the Deputy Magistrate as having stated that he acted under Section 225, Criminal Procedure Code. But as, by the Schedule to that Code, cases under Section 161, Indian Penal Code, are triable by the Court of Session or Magistrate of the district, the Court presume rather that the Deputy Magistrate's order was issued under Section 250, for the offence charged would only, in its aggravated form, be dealt with under Chapter XII., Criminal Procedure Code, within which Section 225 falls. The District Superintendent of Police, the prosecutor in this case, taking advantage of this clerical error in the Deputy Magistrate's order, has applied to you to exercise the powers vested in you by Section 435, Criminal Procedure Code, on the ground that, by the discharge of the accused, there has been a failure of justice.

3. The Court agree with you that the Deputy Magistrate's error does not give you jurisdiction under Section 435, Criminal Procedure Code, since that jurisdiction is expressly limited to the cases of *offences not triable by the Magistrate;* whereas the offence charged in the case under reference is jointly triable by the Court of Session *or* a Magistrate of the district. On this ground alone your action under Section 435, Criminal Procedure Code, is barred. But you are in error in supposing that you cannot so act, because the case has not been dismissed without enquiry, there having been some enquiry, but not, in your opinion, a full and sufficient enquiry, for the words "without enquiry" clearly mean "without proper enquiry." The context shows this: for, in a case in which the evidence taken does, in a Judge's opinion, warrant the commitment of the accused, the Judge can so order it; but when a Judge sees that there are *primâ facie* good grounds for supposing that a charge for such an offence is well founded, but that the Magistrate has dismissed it without enquiry, *i. e.*, without a proper enquiry, he can order such to be made. You are also in error in holding that the Deputy Magistrate's order under Section 225 is an acquittal. An acquittal supposes a *trial*; whereas an order passed under Section 225 would occur only in a *preliminary enquiry.* Even if the discharge be under Section 250, the Court have held that it does not amount to an acquittal, unless the accused has been called upon formally to plead to the charge as therein prescribed.

4. Section 434, Criminal Procedure Code, will clearly not apply to the case under reference, since nothing *contrary to law* appears from the Deputy Magistrate's order.

5. The Court, therefore, consider that, as the Deputy Magistrate's order dismissing the case does not amount to an acquittal, there is nothing to prevent the Magistrate of the district allowing a fresh prosecution against the accused, if he is satisfied that there has been a failure of justice, and such fresh evidence is likely to be produced as will probably result in the conviction of the accused.

Magistrate not precluded from ordering the trial of a person who had been before a Subordinate Magistrate under Chapter XIV., Criminal Procedure Code, but discharged without the evidence of the witnesses for the prosecution being heard.

No. 804.

From the Registrar of the High Court, &c., dated Calcutta, the 15th August 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Officiating Chief Justice,* and the Hon'ble G. Loch and H. V. Bayley, *Judges.*

SIR,—I AM directed to acknowledge the receipt of your Tabular Statement, without date or No. (received on the 27th ultimo), in which you refer for the Court's opinion

the question, whether a Magistrate of a District is barred by Section 434,* Code of Criminal Procedure, from ordering the trial of a person who had been before a Subordinate Magistrate, under Chapter XIV. of that Code, but had been discharged without the evidence of the witnesses for the prosecution being heard.

* It shall not be lawful for any other Court than the Sudder Court to alter any sentence or order of any subordinate Court, except upon appeal by the parties concerned only, made according to the provisions of Chapter XXX. of this Act.

2. In reply, I am to state that the view taken by the Officiating Magistrate and yourself is quite correct, and that there is no room for doubt on the point. An order of discharge, under the circumstances described, is not a final order to which allusion is made in Section 434, Act XXV. of 1861; and the Magistrate is, therefore, not precluded from ordering the trial of the party discharged. If the accused had pleaded to the charge, and had been formally acquitted under Section 225, Criminal Procedure Code, he would, under Section 55, have been exempted from liability to further criminal proceedings.

A case of murder should not be struck off because the accused is under treatment in a Lunatic Asylum and incapable of making his defence.

No. 810.

From the Registrar of the High Court, &c., dated Calcutta, the 6th August 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Officiating Chief Justice.*

SIR,—IN reply to your letter No. 366, dated the 1st instant, I am directed to state that the Magistrate was wrong in striking off from his file a case of murder, because the accused Doneram Jogee was under treatment in the Dacca Lunatic Asylum, and was incapable of making his defence, for Section 391, Criminal Procedure Code, requires that such a case shall be considered as pending before the Magistrate, and shall be included in any Register of pending cases kept by such Magistrate. The case should, therefore, be restored to its former position on the Register of pending cases.

2. The statements forwarded by the Magistrate for the 2nd quarter, which are for the above reason erroneous, are returned for correction and re-submission.

3. The Court in conclusion desire me to remark that, in each successive statement, in which this or any such case may appear, the cause of delay in its decision should be fully set forth.

Trial by Magistrate of parties charged with drugging or poisoning not committed within his District—Transfer of cases or appeals from one Jurisdiction to another—Concurrent Jurisdiction in neighbouring Districts to hold preliminary enquiries into cases of Thuggee.

Extracts (paras. 2 and 3) of Letter No. 814, from the Registrar of the High Court, &c., dated the 19th August 1865.

2. IN reply, I am to state that it appears to the Court that the Magistrate has no authority to try parties charged simply with the offence of drugging or poisoning, when the offence was not committed within his district, and Section 32, Code of Criminal Procedure, does not give him that power. As the Magistrate expressly alludes to the offence of being a thief, *et cetera*, words which, the Court presume, indicate the other offences mentioned in Section 32, I am to observe that that Section enables a Magistrate to enquire into such cases in any district in which the accused person *is*, that is, happens to be *when charged or arrested.* And Section 35 enables the High Court to transfer particular and specific cases or appeals from one jurisdiction to another under certain circumstances; but it does not give the Court the power to transfer a *class of offences* occurring in different districts of one province to one Magistrate. The Court, therefore, is unable to accede to the Magistrate's request.

3. I am to add that, probably, the Commissioner will think proper to apply to the Government to give the Magistrate con-

current jurisdiction in the neighbouring districts to hold preliminary enquiries into cases of Thuggee; but even if this power be conferred on the Magistrate of Monghyr, he will not be able to use it generally at Monghyr, but will have to follow a criminal into the districts which would give him jurisdiction under Section 32.

Notes of evidence by Police Officers to be verified—Grounds of remission of capital punishment to be stated—Adjournment of case with a view to the Court summoning a material witness.

Extracts (paras. 7, 11, and 12) of Letter No. 816, from the Registrar of the High Court, &c., dated the 19th August 1865.

7. WITH reference to the passage in your judgment in the above case, in which you remark that the Assistant District Superintendent of Police "entered a tolerably minute "description of the prisoner in his notes, "*which, of course, witnesses Nos. 1 and 2* "*must have given;*" the Court observe that such notes should not themselves have been considered by you as evidence in this case, unless they were verified by the deposition before you of the Assistant Superintendent. This does not appear to have been the course followed by you. You seem rather to have acted in a manner contrary to Section 145 of the Code of Criminal Procedure, which declares that no statement made by a witness, and reduced to writing by a Police Officer, shall be treated as a part of the record, or used as evidence.

11. The Court further remark that, in your judgment in this case, you have not satisfied the requirements of Section 380, Criminal Procedure Code, in stating the grounds upon which you remitted the punishment of death to which the prisoner had rendered himself liable. You have merely stated that you think it proper to discriminate between "wilful, deliberate, and premeditated killing "and murder, which is committed with less "deliberation and premeditation." This is, the Court remark, no sufficient reason for your having in this case remitted capital punishment.

12. From your judgment in the case of Dahoo and another (Case No. 9 of Statement No. 4), the Court gather that, if Doomun had been cited, or rather produced as a witness by the prosecution, you would not have agreed with the Assessors in acquitting Joomun and Enun. If this was your opinion, the Court think that you showed a want of discretion in not adjourning the case under Section 377, Criminal Procedure Code, and summoning Doomun under Section 367 to appear as a witness—a course you were bound to follow, if you considered that his evidence was "essential to a just decision of the case."

Abetment of Breach of Contract.

No. 821.

From the Registrar of the High Court, &c., dated Calcutta, the 21st August 1865.

SIR,—I AM directed to acknowledge the receipt of your Tabular Memo. No. 32, dated the 15th ultimo, in which you refer for the Court's consideration (together with the papers of the case out of which it has arisen) the question whether an abetment of breach of contract by more than ten persons is an abetment of the nature meant in Section [illegible] Indian Penal Code.

2. In reply, I am to observe that the prisoners in this case appear to have abetted 12 coolies in breaking their several contracts; and the Court's opinion is requested, whether inasmuch as 12 exceeds 10, this is an abetment under Section 117, which, it is presumed, is the Section intended, and not "114." The Court are of opinion that the offence described is not an abetment under Section 117, Penal Code. The offence abetted must have been committed by more than ten persons; whereas in the case under reference each breach of contract is a separate offence under Section 492 by each coolie, so that an abetment of such breach cannot be punished under Section 117, notwithstanding that more than 10 coolies broke their contracts in consequence of such abetment.

Returns called for from Small Cause Courts.

CIRCULAR No. 7.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Judges of the Courts of Small Causes, dated Calcutta, the 8th May 1865.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

THE Court request that the returns be submitted with as little delay as possible in the same form and of the same nature as those submitted for the month of April, distinguishing between suits regarding claims for more than 20 rupees and those for 20 rupees and less.

Contingent Bills.

CIRCULAR No. 8.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Zillah Judges and Judges of Small Cause Courts, dated Calcutta, the 13th May 1865.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

IT is hereby stated, for the information of all Zillah Judges and Judges of Small Cause Courts, that the Government has ruled that, by the expression "Controlling Officers," used in paras. 2 and 4 of the Resolution of the Government of India, in the Financial Department, dated 21st December last,* it was intended to denote Judges of Zillahs and other Controlling Officers whose counter-signature has hitherto been accepted, under standing rules, as authority for passing contingencies within their jurisdiction.

* Appended also to Circular Order from Accountant-General, Bengal, dated 23rd December 1864, No. 3, at page 30 of the *Bengalee Gazette* of the 10th January 1865.

2. The present construction, it will be seen, introduces no change in respect to the *authority* under which contingent charges are passed, which, in the case of the regular Courts of a District, will continue to be the Zillah Judges, and, in that of the Small Cause Courts, the High Court. The only changes effected by the new system are: *1st*, the necessity for an "abstract of the bill," besides the bill in detail, which abstract may be sent every month for payment at once, without pre-audit, to the Treasury Officer at the same time that the bill *itself* is sent for counter-signature to the Zillah Judge, or the High Court, as the case may be, and the said Judge or Court will forward it after counter-signature to the Accountant-General; and, *2ndly* (for the very purpose of rendering the *monthly* pre-audit unnecessary), the "general sanction" of the Zillah Judge, or of the High Court, must be taken *at the beginning of each year* to the scale of contingent expenditure for that year. This general sanction is equivalent to a pre-audit, and must be applied for by the regular Courts to the Zillah Judge, and by the Small Cause Courts to the High Court.

Admission of Copies of Judgments as exhibits.

CIRCULAR No. 9.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 16th May 1865.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor and G. Loch, *Judges.*

THE Court are pleased to determine that, whenever copies of judgments are produced as exhibits in any suit before any Civil Court, they shall not be received unless they be authenticated copies of the original judgment. No copy of a translation of a judgment should be received as documentary evidence in any civil suit whenever the original judgment is forthcoming, and copy of that judgment can be obtained.

Early Registration of plaints enjoined.

CIRCULAR No. 10.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 19th June 1865.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

As, from certain irregularities that have recently been brought to their notice, the Court believe that plaints presented in Civil Courts are not examined without delay, and either registered (Section 38) or dealt with in one of the modes described in Sections 29, 30, 31, 32, 34, and 35 of Act VIII. of 1859, and Sections 3 and 4 of Act XXI. of 1861, but are for some time allowed to remain neglected by the Judge before whom they have been presented, the Court think it necessary to remind all Civil Judges of the extreme importance of complying without delay with the provisions of the law above quoted.

2. No plaint should ordinarily remain unregistered for more than one day; for it is obviously the duty of every Judge to take up, at latest, on the day following their presentation, all plaints filed in his Court. If such a practice is not rigidly observed, the Court can have no confidence that in other respects the procedure laid down in Act VIII. of 1859 is acted up to. Such an irregularity cannot be too strongly condemned, for not only does it tend to encourage corruptness among the Court Amlah, but it causes deception by misrepresenting the files, which should be correctly exhibited in the statements periodically submitted to the Court.

3. The Court, therefore, in reminding Judges of the existence of such irregularities, desire to record their determination to adopt the severest possible measures, not only towards their repression, but to signify their extreme displeasure at the conduct of any Officers who, after this warning, may neglect to conform to the law which recognizes no delay in such simple matters of form.

4. The Court rely upon the exertions of the superior local Courts to check such irregularities by a strict supervision over the proceedings of their subordinates, such as is afforded to them as Courts of Appeal, or in visits of inspection enjoined by Circular Order No. 15, dated 14th May last.

Uncovenanted Civil Judges not to hold appointments in Districts in which they are interested in land—Form of annual certificate prescribed.

CIRCULAR No. 11.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Zillah Judges, dated Calcutta, the 12th June 1865.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

As it is very undesirable for the interests of the public service that Judicial Officers should hold appointments in districts in which they are *either directly or indirectly* interested in land, and as, notwithstanding the endeavours made by the Court to prevent them, the Court have reason to believe that such appointments are very frequent, the Court, with the approval of the Lieutenant-Governor, are pleased to direct that every Uncovenanted Civil Judge shall, without delay, furnish a certificate in the form hereto annexed, and that this shall be repeated every year, and be reported in the Annual Report submitted by the Judge of the district.

2. A copy or translation of each certificate, according as it may have been made in English, or in the Vernacular, should be forwarded to the High Court *before* the 31st July next at *latest.*

3. The Court take this opportunity of warning all Civil Judges of the Uncovenanted Service that, in the event of any of them being inadvertently appointed to a district in which he may be directly or indirectly interested in land, it will be the duty of such Officer to represent the same to the Court, in order that their special orders may be obtained. The Court will not fail to mark their severe displeasure at any disregard of this obligation.

Form of Certificate.

ZILLAH.	Nature of the property and of the interest held therein.	Whether held personally or through or by some relation or some connection by marriage, or other individual.	Date on which this interest was acquired.

Returns by Small Cause Court Judge presiding over more than one Court.

CIRCULAR No. 12.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Judges of Small Cause Courts, dated Calcutta, the 23rd June 1865.

(Civil Side.)

Present :

The Hon'ble C. B. Trevor, *Judge.*

THE Court are pleased to direct that, whenever a Judge of a Small Cause Court presides over more than one Court, he shall submit his returns, whether Monthly or Annual, in such a manner as to show distinctly the work of each Court in which he holds sittings.

Memoranda sent to the Office of Registration of Judgments recorded in English, to be in English also.

CIRCULAR No. 13.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 26th June 1865.

(Civil Side.)

Present :

The Hon'ble C. B. Trevor, *Judge.*

IN continuation of their Circular No. 5, dated 31st March last, the Court are pleased to direct that whenever a judgment is recorded in English, the Memorandum required to be sent to the Office of Registration should be invariably drawn up in that language, for it is evident that the substance of decrees or orders passed by a Judge, such as are entered in such Memoranda, can be best expressed in the language in which they were delivered.

Judgments of Judges sitting in Appeal under Act X. of 1859 to be communicated to the Court of first instance through the Collector of the District.

CIRCULAR No. 14.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Zillah and Additional Judges, dated Calcutta, the 7th July 1865.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

THE Court are pleased to direct that every judgment recorded by a Judge, sitting as an Appellate Court under Act X. of 1859, shall invariably be communicated to the Court of first instance through the Collector of the District, as it is a matter of the utmost importance that the Collector, as the chief executive authority in a district, should be kept fully informed of the manner in which his subordinate Deputy Collectors discharge the duties committed to them.

2. The Court presume that a similar practice obtains among Sessions Judges regarding Criminal Appeals.

The salary of an appointment not to be drawn by a person not holding or conducting the duties thereof.

CIRCULAR No. 15.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges, dated Calcutta, the 28th July 1865.

(Civil Side.)

Present :

The Hon'ble C. B. Trevor, *Judge.*

An instance having been reported to the Court in which a Judge allowed the salary of a particular appointment on his Establishment to be drawn by an Officer who did not hold, or conduct the duties of, that appointment, the Court are pleased to remind all Civil Judges that such a practice is altogether irregular, and directly opposed to the orders of Government, which have created certain appointments with fixed salaries. No deviation from these orders can be permitted without special sanction, and, if any irregularities of the nature above noticed exist, they should at once be put an end to, the Court being informed of the fact.

Closing of the Civil Courts for the Dusserah Vacation.

CIRCULAR No. 16.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 4th August 1865.

(Civil Side.)

Present :

The Hon'ble C. B. Trevor, *Judge.*

The Court are pleased to notify that Civil Courts should be closed for the Dusserah Vacation only on the dates specified in the list of holidays attached to Circular No. 35, dated 19th December last.

Rules for Examination of Candidates for employment as Mofussil Ministerial Officers.

CIRCULAR No. 17.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Zillah Judges and Judges of Small Cause Courts, dated Calcutta, 24th August 1865.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Officiating Chief Justice.*

THE following Rules are circulated by the High Court, at the request of the Lieutenant-Governor of Bengal, for the guidance of Judicial Officers of every grade in testing the qualifications of candidates for ministerial employment in Mofussil Offices. The Rules should be circulated throughout every District, and their observance on all Officers should be strictly enforced.

2. Zillah Judges are requested to report on the working of these Rules in their Annual Reports.

3. The Government Resolution of the 30th January 1856, alluded to in Rule 1st, is re-produced for easy reference.

Orders for the Admission of Candidates for Ministerial employment in Mofussil Offices.

No Apprentice or Umedwar shall be admitted to work in any Mofussil Office, except in conformity with the Government Resolution of 30th January 1856. The employment of Apprentices, without the express and formal sanction of the Head of the Office, is absolutely prohibited.

2. Whenever a vacancy occurs, or is about to occur, either in an apprenticeship or in a paid appointment, a notice of the fact should be suspended in some prominent place in the Office, and a date, which shall not be less than 15 days after the issue of the notice, shall be fixed for filling up the vacancy.

3. No person shall be appointed an Apprentice whose age exceeds twenty years.

4. The number of Apprentices shall not exceed the following scale:—

In the Office of Zillah or Additional Judge	5	Apprentices.
In the Office of Judge of a Small Cause Court or Principal Sudder Ameen ...	3	"
In the Office of Sudder Ameen or Moonsiff, or Registrar of a Small Cause Court ...	2	"

5. If, on the expiry of an Apprenticeship of five years, any Apprentice has failed to obtain a paid appointment, he shall not be retained in the Office in any capacity.

6. On the day fixed for filling up a vacancy, the Head of the Office shall see and examine all applicants and their certificates, and record a proceeding stating that he has done so, noting in detail the claims of the three or four more eligible candidates, and giving his reasons for the selection ultimately made.

7. This proceeding, together with the applications, and any copies of certificates filed, &c., should be made into a regular record, and be available for reference in case of any appeal being made against the appointment.

8. All appointments of 10 rupees a month or upwards, made by a Moonsiff, Sudder Ameen, or Principal Sudder Ameen, should be reported monthly to the Zillah Judge for information, in accordance with the laws* and orders† in force, and the Judge should fill up with his own hand the column reserved for remarks, sending a copy of such remarks for his subordinate's guidance.

* Section 12, Act XXV. of 1837.

† Circular No. 178, dated 25th February 1842.

9. The above orders are to be applicable, not only to permanent appointments, but also to acting appointments vacant or likely to be vacant for three months or upwards.

10. All Apprentices who have not been appointed in conformity with the Government Resolution of the 30th January 1856, all in excess of *five* in any Judge's Office, or of *three* in any Small Cause Court Judge's or Principal Sudder Ameen's Office, and of *two* in any Sudder Ameen's or Moonsiff's Office, and all who have been employed as Apprentices for more than five years, are to be forthwith removed.

GOVERNMENT OF BENGAL.

(Resolution)—General—Education—dated Fort William, the 30th January 1856.

READ again a letter from the Director of Public Instruction, dated the 5th ultimo, enclosing a Memorandum drawn up by Mr. Pratt regarding the system of employing Apprentices in the Government Offices in the Mofussil.

Read a letter addressed to the Board of Revenue on the 31st ultimo, forwarding the above.

Read a communication from the Board, dated the 12th instant.

The Lieutenant-Governor regards the object which Mr. Pratt has in view as one which it is most desirable to obtain, but he is not at present prepared to go further for the purpose of attaining it than to prescribe a general rule, that no Apprentice shall be admitted into any Office without the express sanction of the Head of the Office, to be recorded in a Register to be kept for the purpose. This Register shall record the name and the age of the Apprentice; the kind and extent of education which he has received; to which of the Amlah in the office he is related, or by which of them recommended; with any further particulars that it may seem desirable to the Head of the Office to record. Every Apprentice admitted shall likewise receive a perwannah signed by the Head of the Office, specifying that he is admitted as an Apprentice.

The results to be secured by the above rule will necessarily depend much upon the manner and the spirit in which it is worked by the several Heads of Offices. The Lieutenant-Governor desires, therefore, to signify his hope and expectation that every Officer will feel himself under a strong obligation to evince a real interest in regulating, by means of the rule, the admission of Apprentices into the Public Offices, and that, in every instance, the Head of the Office will satisfy himself by personal examination and enquiry of the respectability of the candidate for admission, and also that he possesses a fair extent of education.

The Lieutenant-Governor would further inculcate upon Officers the propriety of encouraging the acquirement of English by giving a preference to candidates who have received an English education, if in other respects they are as eligible as other candidates who do not know English.

The Lieutenant-Governor thinks it desirable, however, on this point to leave a full discretion in the hands of the Local Officers, informing them merely of the general views and wishes of Government, and trusting to them to give effect to them to the utmost extent that they may deem advisable and right with reference to local circumstances or individual claims. Irrespective of the general reasons which make the Lieutenant-Governor at all times desirous to fetter, as little as possible, the discretion of the Local Authorities in matters of this kind, he is strongly of opinion that, in this particular matter, it would neither be practicable nor wise to attempt to act altogether independently of, and without reference to, the Head Native Amlah.

As a general rule, the Lieutenant-Governor considers it a proper and a judicious proceeding that the opinion of the Serishtahdar of an Office should be consulted in regard to the entertainment of new Amlah, including Apprentices, in an Office for the correct, punctual, and honest working of which he is directly responsible, and the Lieutenant-Governor is satisfied that, in the great majority of cases, if the Covenanted Head of the Office exhibits a true interest in the working of his Office, and at the same time evinces a proper consideration and respect to the Principal Uncovenanted Servants in the Office, he will receive cordial support at their hands, and will find them just as anxious as he is himself to introduce none but respectable and educated young men into the Office. The Commissioners of Revenue and Circuit will take occasion, on visiting the different Stations of their Divisions, to satisfy themselves that proper attention is paid by the District Officers to the admission of Apprentices into their Serishtahs.

ORDER.—Ordered that a copy of these remarks be sent to the Board of Revenue for information and communication to the Officers subordinate to them.

Ordered, also, that a copy of this Resolution, and of the papers above cited, be sent to the Commissioners of Circuit for distribution to the Officers subordinate to them.

Calling attention to Act XIII. of 1865.

CIRCULAR No. 3.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Criminal Authorities of the Lower and Extra-Regulation Provinces, dated Calcutta, the 13th May 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

THE Court requests generally the attention of all Sessions Judges and Magistrates to Sections 22 to 46 of Act XIII. of 1865, which have reference to the *Sittings under a Commission* of the Judge of the High Court, either alone or with an associate Judge, in the exercise of the Original Criminal Jurisdiction in places other than the usual places of the sitting of such Court; and especially the attention of Sessions Judges to Sections 35 and 41, and of Magistrates to Sections 28, 30, and 31 of the same law.

Procedure regarding the record by Sessions Judge of the opinions of Assessors and verdicts of Juries.

CIRCULAR No. 4.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges, dated Calcutta, the 23rd June 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

As the provisions of the law regarding the record by the Sessions Judge of the opinion of the Assessors, in cases tried by him, and in districts in which the system of trial by Jury obtains, of the verdicts of Juries, seem to be imperfectly carried into execution, the Court are pleased to draw the attention of all Sessions Judges to the proper procedure to be observed in this respect.

2. "*The opinion of each Assessor shall,*" it is declared by Section 324 of the Code of Criminal Procedure, "*be given orally, and shall be recorded in writing by the Court.*" The Court desire that this record shall appear at the commencement of the judgment of the Sessions Judge. It is not, in the Court's opinion, sufficient that this record should contain a mere verdict of guilty or not guilty, or proven or not proven; what the Court require is not only the result arrived at by each Assessor sitting on a Sessions trial, but, if possible, the reasons by which each Assessor arrived at that result, that is, the grounds of his opinion. While avoiding prolixity, a Sessions Judge should be careful to be intelligible and precise in recording such opinions.

3. The Sessions Judges of districts in which trials by Jury are held, and all Sessions Judges presiding over trials in which, under Section 323 of the Code of Criminal Procedure, Special Juries shall be empanelled, should, before commencing the proceedings of the trial, record in English the names of all the Jurymen in attendance at the Sessions, and, after the selection by lot, under Section 342, of the persons who are to constitute the Jury in the particular case before the Court, they shall also mark the names of those selected. These papers should form part of the record of the case.

4. If, in accordance with Section 343, any objection be raised to any Juror, the name of the objector, the nature of the objection, and the decision of the Court, shall also be recorded.

5. The verdict of the Jury shall also be stated on the paper on which the foregoing details are set forth.

6. The Court expect that these instructions will, for the future, be implicitly observed.

Registers of Convictions to be kept according to a form prescribed.

CIRCULAR No. 5.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Magistrates in the Regulation and Non-Regulation Provinces, dated Calcutta, the 5th July 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor and G. Loch,

Judges.

For the purpose of enabling Magistrates to ascertain whether parties charged before them with heinous offences have been previously convicted of any of the offences for which enhancement of punishment is provided, on a second or subsequent conviction by Section 75 of Act XLV. of 1860, and Section 4 of Act VI. of 1864, and for purposes of general statistical information, the High Court are pleased to direct that Registers be opened in Magistrates' Offices in the form appended to this Circular. These Registers should contain the names of parties convicted of any of the crimes specified on the margin, and should be in the Bengalee or Urdu language and character, varying according to the Vernacular of the District.

1. Offences relating to Coin and Government Stamps (Chapter XII., P. C.).
2. Offences against Property (Chapter XVII., P. C.).
3. Giving or fabricating false evidence (Sections 193 to 195, P. C.).
4. Falsely charging any person with having committed an unnatural offence (Sections 211 and 377, P. C.).
5. Assaulting or using criminal force to any woman with intent to outrage her modesty (Section 354, P. C.).
6. Rape (Section 375, P. C.).
7. Unnatural offences (Section 377, P. C.).
8. Forgery (Sections 465, 466, 467, 468, 469, P. C.).

Culpable homicide (Section 304).

Causing grievous hurt (Sections 323 to 326, and Sections 329, 331, 333, 335, 338).

2. Every conviction, as sentence is passed, must be entered in the Office of the Magistrate of the District by the Officer whose duty it is to keep the Register of Convictions. In cases committed to the Sessions, the entry will be made on sentence being passed by the Sessions Judge. If a prisoner be released on appeal, whether by the Judge or by the Magistrate, a note should be made in the column of remarks of the date and purport of the order of the Appellate Court.

3. Similar Registers should be kept up in the same manner by Sub-Divisional Officers regarding the offences specified which may have been committed within their respective jurisdictions, and for which any persons may have been convicted. These Officers should report to the Magistrates the entries of the past month regularly at the commencement of each successive month for incorporation in the general District Register.

4. To ensure the proper preparation and keeping up of the Register, the Magistrate or other Magisterial authority in charge shall require the Officer whose duty it is to prepare it to bring the Register for his inspection and signature at least once every week.

5. At the close of the year, an Alphabetical Register of the parties convicted within the twelve months should be made for facility of reference, and at the close of every fifth year an Alphabetical Register should be prepared from the Alphabetical Registers of the previous five years.

6. When a prisoner has been convicted more than once, a note to that effect should be made against his name in the Register opened for that purpose.

7. For the purpose of giving the foregoing Rules retrospective effect, an Alphabetical Register should be at once prepared in the form prescribed in this Circular Order, of parties convicted since the date on which the Penal Code came into force, *i. e.*, from the 1st January 1862 to the end of 1864, the requisite information being derived from the Register of Convictions in the charge of the Record-keeper and of the Jailor.

Name of the Prisoner (including his *alias*, if any).
Name of his Father.
Residence.
Profession or Trade.
Caste.
Age or supposed age.
Height.
Personal marks, such as squint, lameness, loss of limb, permanent scars, &c.
Of what offence convicted.
Date of conviction.
Sentence passed.
Previous conviction.
Remarks.

Arrangement of Records by Sessions Judges and Magistrates.

CIRCULAR No. 6.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges and Magistrates of Districts, dated Calcutta, the 17th July 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

THE Court having reason to believe that the terms of the late Sudder Court's Circular No. 20, dated 20th August 1857, have in many cases been neglected, are pleased to call the attention of all Sessions Judges and Magistrates of Districts thereto, with the view to enforcing for the future a more general observance of its requirements.

2. The Circular is re-produced for easy reference.

3. If the Sessions Judges and Magistrates will, from time to time, visit their Record Rooms (as they should), there will, the Court think, be no difficulty in obtaining a proper arrangement of all their records. The Court desire to impress seriously upon all Officers the extreme importance of this work: for without a proper arrangement of its records, and a periodical clearance of all old and useless papers, the efficiency of a Public Office is much impaired. On the other hand, a neglect of this duty in the course of time leads to such confusion as invariably results in an application for an extra Establishment to perform a duty which, if regularity had been enforced in the Office, should have been executed without any difficulty by the Establishment attached to that Office. The subject has recently been brought to notice by certain applications of this nature, which the Court have, with considerable reluctance, been compelled to submit to Government; but after this warning the Court wish to inform all Sessions Judges and Magistrates of Districts that they expect that the necessity for applications for extra Establishments will not arise, and that, if any such applications are submitted, the Court will be compelled to hold the individual Officer personally responsible for an expense which must be held to have been caused solely by his carelessness and inattention to orders.

4. Mention of the state of their Record Rooms should invariably be made in the Criminal Reports of Sessions Judges and Magistrates. The Court will not be satisfied with a mere cursory mention, but require a clear description of the state of each Record Room, and the dates up to which the records have been sorted or destroyed, so that it may appear without doubt that this duty has in no way been neglected.

RULES.

I. Records of Sessions trials and heinous (*i. e.*, non-bailable) cases of Magistrates' Courts generally of above 14 years' date may unobjectionably be destroyed, a discretion being exercised at the same time by the Sessions Judges and Magistrates of preserving individual cases or papers on any grounds appearing to them sufficient; cases in which sentences are not expired must invariably be preserved.

II. Provided that cases in which parties accused have hitherto eluded apprehension shall always be preserved.

III. The above Rules should be acted on from year to year, so that no accumulation may occur beyond a term of 14 years in regard to the records of heinous (*i. e.*, non-bailable) cases.

IV. In regard to the records of the Magistrate's Court, the following may be destroyed yearly, if upwards of two years old, excepting those which the Magistrate may deem it prudent to preserve in consequence of the non-arrest of particular offenders or non-realization of fines. In case of the last description, the records should be destroyed, at all events, after six years from the date of sentence:—

Security cases, if expired.

Petty (*i. e.*, bailable) trials.

Act IV. of 1840 (re-enacted in Chapter XXII., Act XXV. of 1861) suits, excepting the decisions and documents, plaints and answers.

Miscellaneous Cases.

Thannah Diaries.

Police Reports, in which no further proceedings followed.

Miscellaneous Ruboocarees.

Ditto Reports and Returns by the Nazir.

Copies of Perwannahs.

Ditto of Ishtahars.

Despatch Books.

Receipt Books of the Record Room.

Rough Order Books.

Witnesses' Attendance Books.

Appeals.

Nazir's Records, excepting *lotbundees*, accounts of money, and Ferry Ghât papers.

Miscellaneous Reports of the Jailor.

Miscellaneous Petitions.

Periodical Statement, except Register of petty (*i. e.*, bailable) cases.

Register of Mooktearnamahs, excepting "general" ones.

Register of Miscellaneous Cases.

Ditto Petitions.

V. In regard to cases appealed to the Sessions Court, the Sessions Court record of such cases may be periodically destroyed after a term of six years. Thus, on the 1st January next, all appeal records of this nature may be destroyed appertaining to a date previous to 1st January 1853 (*i. e.*, at the present time, 1860).

The salary of an appointment not to be drawn by a person not holding or conducting the duties thereof.

CIRCULAR No. 7.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges, dated Calcutta, the 28th July 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

An instance having been reported to the Court in which a Judge allowed the salary of a particular appointment on his Establishment to be drawn by an Officer who did not hold, or conduct the duties of that appointment, the Court are pleased to remind all Sessions Judges that such a practice is altogether irregular and directly opposed to the orders of Government, which have created certain appointments with fixed salaries. No deviation from these orders can be permitted without special sanction, and, if any irregularities of the nature above noticed exist, they should at once be put an end to, the Court being informed of the fact.

Trial of Murder Cases—Dusserah Vacation.

CIRCULAR No. 8.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges, dated Calcutta, the 4th August 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

The Court request that, in holding their Jail deliveries for September next, Sessions Judges will make arrangements for trying, as far as possible, at the commencement of their Sessions, all cases in which murder (Section 302, Penal Code) is one of the offences charged, as it is important that the orders of the High Court in all cases in which capital sentences have been passed should be obtained and communicated to the Sessions Courts before the commencement of the vacation.

2. The High Court expect no Sessions Judge will close his Court for the Dusserah Vacation as long as the orders of the High Court regarding such capital sentences have not been received.

Use of English as the language for the record of evidence in cases tried in Courts of Session.

CIRCULAR No. 9.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges, dated Calcutta, the 28th August 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Officiating Chief Justice.*

THE Court request the immediate attention of all Sessions Judges to Government Notification, dated 6th instant, published at page 1422 of the *Calcutta Gazette*, which introduces English as the language for the record of evidence in cases tried in Courts of Session. The Court desire to impress upon all Sessions Judges the great responsibility that is thus thrown upon them, and the extreme necessity for the utmost care in rendering accurately, into English, the Vernacular expressions made use of by witnesses. In depositions in which there may be any doubt as to the exact meaning of any expression used, and in which the doubtful expression has an important bearing on the offence of which the prisoner is charged, the Court would suggest the expediency of transcribing, in Roman characters, the words actually used, in order that the Court may be in a position, on the matter coming before it, without fear of error, to determine on their exact signification, and, in consequence, to give them their due and proper weight. The Court rely with confidence on the care and discretion of Sessions Judges in exercising the very responsible powers now conferred on them.

2. The Court believe that all Sessions Judges are fully acquainted with the Vernacular language in ordinary use in their districts; but should any instance occur in which a foreign language is used, or in which the evidence may be delivered in a dialect to which a Judge may be unaccustomed, an Interpreter should be employed in the manner prescribed by Section 431, Code of Criminal Procedure.

3. In conclusion. the Court desire only to remind Sessions Judges that the notification of Government does not refer to the examination or defence of the accused, which should, as heretofore, be recorded in the language and exact words in which it is delivered.

SMALL CAUSE COURT REFERENCES.

The 26th May 1865.

Present :

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Limitation—Suit for balance of account and fresh advance for Cultivation of Indigo.

Reference from Baboo Doorgapershad Ghose, Officiating Judge of the Principal Court of Small Causes at Krishnaghur, dated the 23rd March 1865.

Mr. John J. Doyle *versus* Khooseeal Khan.

Mr. R. V. Doyne for Plaintiff.

Baboos Kishen Kishore Ghose, Kadar Nath Mojoomdar, Greejasunkur Mojoomdar, and *Obhoy Churn Mojoomdar* for Defendant.

Clause 9 of Section 1, and not Section 8, Act XIV. of 1859, is applicable to a suit for balance of account and fresh advance made for the cultivation of Indigo, where the defendant fails to perform his part of the contract.

THE Judge of the Principal Court of Small Causes at Krishnaghur has stated a case for our opinion in the following words :—

"In the case noted in the margin (Mr. "John J. Doyle *versus* Khooseeal Khan), "the plaintiff sued the defendant in this "Court for the recovery of rupees 63-14-3 "due on *khata.*

"The defendant having had Indigo deal-"ings with the Mohinuth Factory, his ac-"counts were adjusted on the 13th December "1859, when a balance of rupees 62-5-8 was "struck against him, and a fresh advance of "one rupee in cash and 8 annas 9 pie in "Indigo Seed made to him for producing "Indigo Plant in 1860.

"The defendant having stopped the deal-"ing by ceasing to cultivate Indigo from "1861, the plaintiff brings this suit against "him."

On this state of fact, the Small Cause Court Judge asks us the question, whether the provisions of Clause 9 of Section 1 of Act XIV. of 1859, or those of Section 8 of the same Act, are applicable to the suit?

We have heard the Counsel and advocates of each side respectively and have considered the case submitted to us. It was admitted before us, although the case is silent on the point, that the *relation of landlord and tenant* did not exist between the parties, who are entire strangers to each other, except so far as the Indigo dealings, which are set out, are concerned. Under these circumstances, we are of opinion that, immediately on the striking of the balance, the rupees 62-5-8 became a debt due from the defendant to the plaintiff on *a simple contract* to pay, for which the statement of account then come to was the consideration. We also think that the subsequent giving of credit in respect of this item and the balance of the 8 annas 9 pie was matter of simple contract between the parties. It appears that the defendant has failed to fulfil his part of this contract, and it may be that there has been a complete failure of the consideration promised by him. If so, the law implies a binding contract on his part to pay back the money which he received from the plaintiff on faith of the promise. But whether the plaintiff's right to sue in this case is technically referable to defendant's breach of the contract under which the money was advanced, or to a contract to refund subsequently implied, in either alternative the suit comes within the operation of Clause 9. Section 1 of Act XIV. of 1859. Therefore, we do not think, as contended for by Mr. Doyne, that it was one not expressly provided for or came under Clause 16 of the Act.

We further think that the parties to this suit did *not*, in the slightest degree, stand towards each other in the relation of *merchants and traders*, "who have had mutual dealings," within the words of Section 8 of the above Act.

We accordingly certify that, in our opinion, Clause 9, Section 1 of Act XIV. of 1859, is applicable to the suit.

The 9th June 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Limitation—Suit to recover consideration-money of dur-putnee cancelled by sale of putnee for arrears of rent.

Case No. 136 of 1865.

Judoonath Bhuttacharjee and another, *Plaintiffs,*

versus

Nobokisto Mookerjee and others, *Defendants.*

Baboo Issur Chunder Chuckerbutty for Plaintiffs.

The special rules of limitation in Clause 5, Section 17, Regulation VIII. of 1819, refer only to the disposal of the sale-proceeds of a putnee sale, and do not apply to a suit to recover consideration-money paid for a dur-putnee cancelled by the sale of the putnee for arrears of rent. Such a suit is governed by the general rules of limitation under Act XIV. of 1859.

The following case was submitted to the High Court by the Small Cause Court Judge of Meherpore, dated the 24th April 1865.

THE plaintiffs in this case sue on the basis of a dur-putnee pottah, to recover consideration-money paid by them to the defendant for a dur-putnee, which had become cancelled in consequence of the sale, on the 1st Joistee 1271 B. S., under Regulation VIII. of 1819, of the putnee for arrears of rent of the last half-yearly kist of 1270 B. S. The sale, it is alleged, has been caused by the non-payment of the rents of the putnee to the zemindar by the defendant, and the dur-putnee pottah stipulates that the defendant should make good the loss in case the putnee is sold on account of his default.

The pleader for the defendant pleads that the claim is barred by limitation under Clause 5, Section 17 of Regulation VIII. of 1819, which provides that actions for the recovery of claims like the above should be instituted at any time within two months from the date of sale, whereas the plaintiffs have not instituted the present action until after the expiration of ten months and two days. On the contrary, the plaintiff's pleader contends that Clause 5, Section 17 of the above Regulation, is only applicable to suits brought to recover the price which a party may have paid for a putnee or dur-putnee talook, or compensation for the loss sustained by him in consequence of the sale out of the proceeds of any sale made under the above Regulation, and not to suits based on putnee or dur-putnee pottahs, which should be considered in the light of suits founded on simple written contract, and governed by the general rules of limitation mentioned in Clause 10, Section 1 of Act XIV. of 1859, which enacts: "To "suits brought to recover money lent on "interest, or for the breach of any contract in "cases in which there is a written engagement "or contract, and in which such engagement "or contract could have been registered by "virtue of any Law or Regulation in force "at the time and place of the execution there-"of, the period of three years from the time "when the debt became due, or when the "breach of contract in respect of which the "action is brought first took place, unless "such engagement or contract shall have "been registered within six months from the "date thereof."

This contention appears to me to be erroneous, as from the wording of Clause 5, Section 17, which enacts: "It shall be com-"petent to any one conceiving himself to pos-"sess such an interest, to bring forward his "claim to the price he may have paid for the "same, or for a just compensation for the loss "sustained by him in consequence of the "sale by instituting a regular suit at any "time within two months from the date of "sale. If the Court shall, on investigation, "consider the plaintiff's claim to be an equit-"able one, the Court will award to the claim-"ant either the price he may have originally "paid, or the value of the interest at the "time of sale, or any other amount that may "be deemed just and equitable under all the "circumstances. If there be more claimants "than one, payment shall not be made from "the deposit until the whole of the claims be "settled, and, in case the value assessed upon "the whole should exceed the amount in de-"posit, such amount shall be divided propor-"tionally, and the remainder stand as a per-"sonal debt against the defaulter to be realiz-"ed from him by the usual process for the "execution of decrees;" and from the wording of Section 3 of Act XIV. of 1859, which enacts: "When by any law now "or hereafter to be in force, a shorter period of

" limitation than that prescribed by this Act is " specially prescribed for the institution of a " particular suit, such shorter limitation shall " be applied notwithstanding this Act." I am clearly of opinion that the claim which is simply one for the recovery of the consideration-money, falls within Clause 5, Section 17 of Regulation VIII. of 1819, and is barred by limitation. I have, therefore, dismissed it with costs, subject to the orders of the High Court, which are now solicited.

As the plaintiff's pleader states that there are other claims of this nature, it would be better if the point should be authoritatively settled. I have, therefore, on his application, thought it proper to refer the matter for the orders of the Court.

The plaint and the dur-putnee pottah, in original, are herewith submitted for the information of the Court.

Judgment.—On the case above stated, we are of opinion that Clause 5, Section 17 of Regulation VIII. of 1819, *does not apply* to this case. The first portion of that Section is in these words: "The following rules have " been enacted *for the disposal of the pro-* " *ceeds*" of any sale made under the rules of this Regulation. The Clauses, which precede and follow, each and all, refer to matters of details *as to the sale-proceeds.* In Clause 5 itself, the latter portion of the Clause, the " claimants," "the claim," "the payment," and the " deposit" mentioned, *all refer* to the matter of the sale-proceeds.

The Judge here states that this claim is " simply one for the recovery of considera- " tion-money," but we do not think that this is correct under the law cited.

The general rules of limitation then under Act XIV. of 1859 would, in our opinion, apply, and *not the special rules* in Section 17 of Regulation VIII. of 1819, which, in our view, *refer only to the disposal of the sale-proceeds of a putnee sale.*

The 10th June 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Jurisdiction—No suit for money paid out of Court in execution of decree.

Case No. 1797 of 1865.

Alumja Beebee and another, *Plaintiffs,*

versus

Gooroo Churn Roy, *Defendant.*

The following case was submitted to the High Court by Mr. C. D. Field, Officiating Judge of the Principal Court of Small Causes at Jessore, dated the 26th April 1865.

No suit will lie for money paid out of Court in execution of a decree without satisfaction having been entered on the decree. All such questions must be determined by the Court executing the decree.

THIS suit was brought to recover rupees 61-12, alleged to have been paid by the plaintiff to the defendant in satisfaction of a decree. Payment was said to have been made between the parties in *the Mofussil,* and not through the Court. Execution was, however, subsequently taken out, and plaintiff, having had to pay under the execution the amount of the decree, now sues to recover the above sum, which the former decree-holder, and defendant in the present case, is said to have received and appropriated without having 'satisfaction' entered on the decree at the time. The case is what would be called in English law an action for " money had and received," which form of action " lies for money paid by mistake, or upon a consideration which happens to fail; or for money got through *imposition* express or implied, or *extortion,* or oppression, or an undue advantage taken of the plaintiff's situation contrary to laws made for the protection of persons under these circumstances." (Chittyon Contracts, 7th Edition, page 544).

It is pleaded that the action is barred by Section 11 of Act XXIII. of 1861; that, if the payment in question were made, the present plaintiff should have appeared when execution was subsequently taken out against him, and should have alleged the payment which would have been enquired into under this Section, the language of which now debars him from bringing a separate suit. Now, Section 11 of Act XXIII. of 1861 is worded exactly (as far as this point is concerned) like the Section of Act VIII. of 1859 repealed, *viz.,* Section 283. Act XXIII., therefore, made no change in the law on the subject. But *Section* 206 of Act VIII., which has never been repealed or altered, is as follows:—

" All monies payable under a decree shall be paid into the Court whose duty it is to execute the decree, unless such Court, or the Court which passed the decree, shall otherwise direct. *No adjustment of a decree in part or in whole shall be recognized by the Court unless such adjustment be made through the Court, or be certified to the*

Court by the person in whose favor the decree has been made, or to whom it has been transferred."

It appears to me that, under this Section, the plaintiff could not have had the question of a payment not made through the Court enquired into in the execution-proceedings; and, if this be so, he is certainly entitled to recover back the money, before paid (if paid) and fraudulently appropriated by the present defendant. The vakeels have then urged: "If this be so, to what does Section 11 of "Act XXIII. of 1861, and the words 'sums "*alleged* to have been paid in discharge or satis-"faction of the decree or the like'" refer? The Section would, I think, apply if money were alleged to have been paid to a Court Ameen, Bailiff, or other Officer of the Court. If the present action cannot be sustained, manifest injustice would be done in many cases—for instance, if a judgment-debtor had paid the amount of a decree, and the decree-holder, appropriating the money, took out execution again when the debtor was absent from home. I am, therefore, of opinion that the action will lie, and that it is not barred by Section 11 of Act XXIII. of 1861: and on *this*—the first point—the decision of the High Court is solicited.

The second point is as follows: The payment is said to have been made in Phalgoon 1268, and the suit was not instituted till 28th Choitro 1271. Is the claim barred by the Law of Limitation? The first question is, what period of limitation will apply? I think that contained in Clause 9 of Section 1 of Act XIV. of 1859 applicable to a *breach of contract*. There was an *implied contract* that the former decree-holder would, on receiving the money, have satisfaction entered on the decree. Then comes the question, when was a breach of this implied contract committed? Did the breach, which furnished the ground for the present action, occur when the present defendant again took out execution of the decree, or when he received the money, and allowed his first application for execution to be struck off without admitting the payment? It is urged that plaintiff could have had no cause of action until the second execution-proceedings were commenced. This general proposition is, however, untenable. A demand to have the fact of payment certified to the Court, and a refusal to do so, would have, at any time, supplied a ground of action. It is urged also that plaintiff was the victim of fraud, and is entitled to the benefit of Section 9 of Act XIV. of 1859. This is also untenable. He could have ascertained at any time if the fact of payment had been certified to the Court, and was not prevented from doing so by any act of the defendants. The present is not a case where the cause of action was fraudulently kept secret, but where the fraudulent act is itself the ground of action.

It is alleged that the money was paid on the day fixed for the sale of the goods under the first execution-proceedings, which day fell in Phalgoon 1268. It appears to me that, under such circumstances, there was an implied agreement that the fact of payment would be certified to the Court when allowing the attachment to be withdrawn, and that the failure to do so constituted the breach of the implied contract, which is the ground of action in the present case. In the ordinary course of procedure, information of the agreement of the parties and the execution return would have reached the Court before 28th Choitro, or in less than 28 days after the day fixed for the sale. It therefore appears to me that the suit is after time, and that plaintiff has *his own laches* to blame for not ascertaining whether the fact of payment was certified to the Court or not. Had not his goods been seized in execution, thus necessitating a return to the Court of the execution-proceedings, or had there been no demand and refusal to certify payment to the Court, I think the period of limitation would rightly begin to run from the time when the decree-holder commenced the second execution-proceedings. If it be admitted that the failure to certify the payment to the Court or Officer of the Court charged with the execution-proceedings, when allowing the attachment to be withdrawn, was the breach of contract which gave a cause of action, then the fact of the plaintiff in the present case being unconscious of such breach will not prevent the Statute from running. (*See* the cases quoted in Chitty on Contracts, 7th Edition, page 732. *See* also Addison on Contracts, 5th Edition, page 1004).

Opinion of High Court.—We are of opinion that there is not, in all cases where money due under a decree is paid by a judgment-debtor to a judgment-creditor out of Court, an implied contract that the judgment-creditor will certify such payment to the Court. Section 206 of Act VIII. of 1859 was enacted to put an end to the constant disputes regarding payment arising between parties to a suit in con-

sequence of their making such payment not through the Court. It may be that a judgment-debtor might have a cause of action against a judgment-creditor, when in making such a payment there was an express contract that the latter should certify the payment to the Court, and the latter in fraud failed to act up to that contract. We give no opinion upon that point, as we understand that it does not arise in this case. But when there is no such express contract, and the judgment-debtor, in contravention of the law, adjusts the decree against him without reference to the Court, he has only himself to blame if an unscrupulous creditor takes advantage of his breach of the law. If such suits as the present are admitted, Section 206 of Act VIII. of 1859 becomes a dead letter, and so also does Section 11 of Act XXIII. of 1861, which rules that all questions between parties to a suit, relating to sums alleged to have been paid in discharge or satisfaction of the decree, shall be determined by order of the Court executing the decree, and not by a separate suit.

As we decide on the first point, that the plaintiff's suit, assuming it for argument's sake to be founded on an implied contract merely, will not lie, it is not necessary to go into the second point referred to us.

The 14th June 1865.

Present:

The Hon'ble *Sir* Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, J. P. Norman, and Shumbhoonath Pundit, *Judges*.

Limitation (Period of—not affected by holidays).

Reference to the High Court by Baboo Punchanun Banerjee, Judge of the Small Cause Courts of Hooghly and Serampore.

Rajkisto Roy, *Plaintiff*,

versus

Denobundhoo Surmah, *Defendant*.

Under Act XIV. of 1859, a suit is barred by limitation where the time for its institution expires on a holiday.

Case.—THE plaintiff sues on a bond for rupees 33, dated the 7th Chyte 1267, purporting to have been payable in the month of Assin 1268. The suit was instituted on the 16th November 1864, corresponding with the 2nd Aghran 1271, or one month and one day after the expiration of the period of limitation, the Court having been closed from the 3rd October to the 2nd November 1864, both days inclusive, on account of the Dusserah Vacation; and on the 8th and 9th November, on account of Juggodhatree Poojah; and on the 14th and 15th November, on account of Kartick Poojah, under the Court's Circular No. 35, dated the 9th December 1863; and on the 3rd, 4th, 5th, 7th, 10th, 11th, and 12th November, under the special permission of the Court, conveyed by their Circular No. 24, dated the 13th August 1864, that is to say, from the 3rd October to the 15th November inclusive, without intermission. The defendant has not appeared. Under such circumstances two questions arise for determination :—

1st.—How does the Court's ruling, that the plea of limitation, unless urged by the defendant, cannot be raised by the Court, affect an *ex-parte* case, in which the defendant neither takes nor waives that plea?

2ndly.—Whether a plaintiff, suing after the expiration of the period of limitation, the last day of which falls during an authorized vacation, is in time if he comes to Court on the first day the Court re-opens?

In regard to the *first* of these questions, I am of opinion that, as the defendant does not appear, and, by his defence, waive the plea of limitation, it is competent to the Court to raise that plea of its own accord. Where the defendant is absent, it is the duty of the Court to satisfy itself that the plaintiff's claim is sustainable both on the law and the facts; one of the broad principles on which the Statute of Limitation is founded is—"Laws assist the vigilant, not those who sleep upon their rights;" and that principle applies with equal force, whether the defendant appears or not.

With respect to the *second* question, I am of opinion that the plaintiff is out of Court under the Law of Limitation. The plaintiff cites, as a precedent, a decision of the late Sudder Court of the 7th December 1858; but that judgment was passed when the old Law of Limitation (Section 14 of Regulation III. of 1793) was in force, but, as observed by the High Court in their judgment in the cases noted in the margin, Act XIV. of 1859, Section 1, Clause 16, does not contain the exceptions which are found in Regulation III. of 1793, Section 14; one of which exceptions is the inability

Cases Nos. 397 and 402 of 1860.
No. 397.
Unnodagobind Chowdhry and others (Defendants), *Appellants*,
versus
Ranee Surnomoye (Plaintiff) and others (Defendants), *Respondents*.
No. 402.
Obhoy Gobind Chowdhry (Defendant), *Appellant*,
versus
Ranee Surnomoye (Plaintiff) and others (Defendants), *Respondents*.
Decided 2nd April 1864.
Special Number, Weekly Reporter, page 165.

of the plaintiff, from any good and sufficient cause, to obtain redress. Even, under the old law, the Sudder Court at Agra held that proceedings, if not instituted before the expiration of the period fixed by law, cannot be instituted afterwards, though that period expired during an authorized vacation, the plaintiff being entitled to the benefit of the time during which the Court is adjourned only when it is accidentally closed.

Order of Justices Bayley and Phear referring the case to a Full Bench.

We concur in the opinion expressed by the Judge of the Small Cause Court, and we think that, under Act XIV. of 1859, limitation would bar a suit where the time within which the act is to be done expires on a Sunday, holiday, or *dies non.*

But as the Third Bench, by the decision of April 24th,* has held another opinion, we refer the matter for the decision of a Full Bench.

Judgment of the Full Bench.—We think that the Judge of the Small Cause Court was right in this case; and we agree in opinion with the learned Judges who referred the question to a Full Bench. The case which they cite, and assume to be opposed to their view, relates to the time for preferring an appeal, and does not conflict with this decision. By Section 333 of Act VIII. of 1859, appeals are to be presented within the period prescribed, unless the appellant shall shew, to the satisfaction of the Appellate Court, sufficient cause for not having presented it within the limited period. But the Limitation Act contains no words to a like effect.

The period is fixed by the Act, and no discretion is given to the Courts to extend the time.

The 22nd June 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Limitation—Admission by debtor in a writing addressed to a third party.

Huro Chunder Roy, *Plaintiff;*

versus

Monee Mohinee Dossee, widow of Doorga Churn Singh, deceased, *Defendant.*

An admission by *A* of his debt to *B* contained in a *burat* given by *A* to *A's* agent may take a suit against *A* out of the Statute of Limitation.

THE following was referred by the Judge of the Small Cause Court at Hooghly and Serampore to the High Court for its decision:—

"The plaintiff alleges that the husband "of the defendant took from him a loan of "62 rupees for the purpose of paying the "Pous and Cheyt kists of the revenue of "his talook for the year 1264, no written "instrument being executed, and no stipu-"lation made for the payment of interest; "that the loan was not re-paid by the de-"fendant's husband during his life-time; and "that, after his death, the plaintiff demand-"ed payment of the money from the defend-"ant, who, on the 16th Maugh 1271, gave "a *burat* upon Sobayram Bhuttacharjee, "manager of his talook, for 25 rupees out "of the amount of the loan, admitting

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* The 24th April 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Petition of Special Appeal from a decision of the Second Principal Sudder Ameen of the 24-Pergunnahs, dated the 14th January 1865, affirming a decision of the Moonsiff of Baraset, dated the 14th September 1864.

Appeal laid at rupees 11-10-10 gundahs.

Note by the Deputy Registrar.—THE time (90 days) for preferring this special appeal expired yesterday (*Sunday*), and the appellant has appeared to-day in person to present it.

The law, Regulation VII. of 1832, Section 2, Clause 4, which prescribes that, "when the periods for "preferring appeals expire during the adjournment "of the Court on account of any holiday or vacation, "no default shall attach to the appellant, provided "the appeal be presented immediately on the re-"opening of the Court," has been repealed by Act X. of 1861; and, by consequence also, the rule laid down in the appeal of Koon Koon Singh (Summary Reports, p. 76), to the effect that the last day allowed for the appeal falling on a *Sunday*, the appeal is admissible on the following day, has been rendered null.

There is, therefore, now no law or rule countenancing the practice of admitting an appeal, when the time for preferring it has expired on a holiday, on the day following; while the principle laid down at p. 158† of Macpherson on Mortgages, founded on a decision of the North-Western Court, *viz.*, "the fact of the twelve years having expired during the Dusserah Vacation, is no ground for admitting the suit on the first Court-day after the vacation," is against the practice.

† Page 182 of the 2nd Edition.

May I beg, therefore, the orders of the Court on the point, whether, under the circumstances, appeals can any longer be entertained, when the time for preferring them has fallen on a day on which the Court may have adjourned on account of a holiday or vacation, on the first Court-day.

Order.—We think the petitioner is entitled to have an extra day, when the last day on which he can file an appeal falls on a *Sunday* or other close holiday. Admit the appeal.

" therein her debt to the extent of 62 " rupees."

" The defendant denies the plaintiff's de- " mand, and pleads limitation in bar of the " hearing of the suit."

" The plaintiff contends that, since the " defendants admitted her debt in the *burat* " given by her upon her agent Sobayram " Bhuttacharjee on the 16th Maugh 1271, " under Section 4 of Act XIV. of 1859, a " new period of limitation is to be completed " from that date, and he is consequently in " time. The defendant urged that, to take " the case out of the Statute of Limitation, " an engagement in writing to re-pay the " alleged debt is necessary, as required by " Clause 9 of Section 1 of Act XIV. of 1859. " I am of opinion, however, that Clause 9 of " Section 1 of Act XIV. of 1859 does not " bear the construction the defendant would " put upon it. The written engagement " alluded to therein is, that which the par- " ties enter into at the time when the ori- " ginal contract is made. The Clause in " question provides for cases in which no " written instrument is executed by the " party taking the loan or making the con- " tract; whereas Clause 10 of the Section " provides for cases in which a written in- " strument is executed, of which there are " two classes: *1st*, those in which the in- " strument is registered; and, *2ndly*, those in " which the instrument is not registered. " Under a different view, it is not easy to " reconcile Clause 9 of Section 1 of Act " XIV. of 1859 with Section 4 of Act XIV. " of 1859; the former requiring an engage- " ment in writing, and the latter a simple " acknowledgment in writing without any " undertaking to re-pay. There exists, there- " fore, no doubt in my mind that Clause " 9 of Section 1 of Act XIV. of 1859 does " not refer to cases in which claims barred " by limitation are capable of being revived, " the only provision on the point being that " contained in Section 4. It now remains " to be considered whether, under Section " 4 of Act XIV. of 1859, the admission in " the *burat* alluded to above bars the opera- " tion of the Law of Limitation; or, to re- " duce the question within narrower limits, " whether the admission is an 'acknowledg- " ment' within the meaning of Section 4 " of Act XIV. of 1859. Now, an ac- " knowledgment may be in a writing ad- " dressed by the debtor to the creditor, or " in a writing addressed by the former to a " third party, containing a recital of the debt, " as is the case in the present instance. " There is nothing in the wording of the " Section which restricts the meaning of the " word 'acknowledgment' to an admission " in writing addressed to the creditor: any " acknowledgment in writing signed by the " debtor comes, I believe, within the purview " of the Section. I am, therefore, of opinion " that the admission by the defendant in the " *burat* in question takes the suit out of the " Statute of Limitation."

Judgment of the High Court.—The Court concur with the opinion expressed by the Judge of the Small Cause Court that the admission by the defendant of the plaintiff's debt, in the *burat* given by her to her agent on the 16th Maugh 1271, takes the suit out of the Statute of Limitation.

Clerk of Small Cause Court (Powers of)—Execution of decree—Moveable property beyond jurisdiction of Small Cause Court.

From the Registrar of the High Court, &c., to the Officiating Judge of Jessore, No. 2250, dated Calcutta, the 7th July 1865.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, G. Loch, and W. Morgan, *Judges.*

A Clerk of a Small Cause Court is not authorized to sign the copy of the judgment and certificate alluded to in Section 20, Act XI. of 1865.

Moveable property beyond the local limits of Smal Cause Courts is not liable to be taken in execution.

SIR,—I am directed to acknowledge the receipt of your letter No. 86, dated 7th ultimo, in which you request instructions on a reference from the Moonsiff of Khoolnah as to whether the signature of a Clerk of a Small Cause Court to a decree certificate is sufficient to enable a Civil Court to execute the decree.

2. In reply I am to observe that, under Section 45 of Act XI. of 1865, Clerks can issue all "Summonses, Warrants, Orders, and Writs of Execution," and do other things not the subject before the Court; but it appears to the Court that these words do not enable him to sign the copy of the judgment and certificate alluded to in Section 20 of the Act above cited, which should be signed by the Judge himself. I am to add, for your information and that of the Moonsiff, that

it has been ruled that *moveable* property beyond the local limits of a Small Cause Court is not to be liable to be taken in execution.

3. It is true that the particular words occurring in Section 286 of Act VIII. of 1859, *viz.*, "after being signed by the Judge and sealed with the seal of the Court," are not in the recent law above cited; but this omission, it appears to the High Court, is insufficient to bring the signing of these important papers within the scope of the Clerk's authority. The words requiring the seal of the Court to be affixed to the copy of the judgment and certificate mentioned in Section 20 are equally absent from that Section with the words requiring the Judge's signature; yet this does not obviate the necessity for the *seal*, and it cannot therefore warrant the omission of the Judge's *signature*. It cannot be supposed that the Legislature intended the documents in question to go forth with no other mark of their being legal documents than the Clerk's signature.

Limitation—Execution of Decrees.

From the Registrar of the Appellate High Court, to the Judge of the Small Cause Court of Meherpore, No. 2494, dated Calcutta, the 26th July 1865.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor and G. Loch, *Judges.*

How limitation applies in certain cases instituted after the passing of Act XIV. of 1859, and decreed before the 1st January 1862, in which application for execution of the decrees has for the first time been made after the completion of three years from the dates of the decrees.

SIR,—I am directed to acknowledge the receipt of your letter No. 20, dated the 26th January last, wherein you request the opinion of the High Court as to the way in which limitation applies in certain cases instituted after the passing of Act XIV. of 1859, and decreed before the 1st January 1862, in which the decree-holders have, for the first time, applied for execution of the decrees after the completion of three years from the dates of the decrees.

2. In reply I am to state that there is no doubt you are quite correct in holding that the application for execution in these cases are barred by limitation. Adverting to the contention raised before you with reference to Act XI. of 1861, to the effect that the three years laid down in Section 20, Act XIV. of 1859, should be reckoned from the 1st January 1862, I am to observe that Act XI. of 1861 only postponed the operation (amongst other matters) of Act XIV. of 1859 until the 1st January 1862, but after date the new Law of Limitation had as full operation as if Act XI. of 1861 had never been passed, and all decrees in execution became subject to the provisions of Act XIV. of 1859. As, therefore, the decrees in the present case were passed more than three years before the applications were made for execution, they are barred by lapse of time.

The 28th July 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Review of Judgment (on reference from Small Cause Court).

Petition for a review of judgment passed by Justices Bayley and Phear, on 25th May 1865, on a reference from the Small Cause Court of Krishnaghur.

Mr. J. J. Doyle, *Petitioner,*

versus

Khosal Mundle, *Opposite Party.*

Mr. R. T. Allan for Petitioner.

An application for a review of judgment by the High Court, on a reference from a Small Cause Court, is not admissible.

WE are of opinion that this petition ought to be rejected for the following grounds apparent on the face of it:—

1. There is no *Review*. This is not a "decree" of the High Court in any case. The *Small Cause Court* is only bound to pass a *decree* according to its *judgment* on a case stated or found.

2. No *error* or *omission* in *anything requisite for the ends of justice* appears in our opinion, relative *to the case stated*, to render a review necessary.

3. If, petitioner wishes to *alter* the case stated by the Small Cause Court, the present petition is not the right mode of doing it.

4. If the case were re-stated in the form desired by the petitioner, the judgment of this Court would be the same, and would be couched in the same terms as at present.

The 14th January 1865.

Present :

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Cutting Trees—Damages—Lease—Laches of Lessor—Limitation.

Reference to the High Court by Baboo Banee Madhub Shome, Officiating Judge of the Court of Small Causes of Kooshtea.

Rajah Indoobhoosun Deb Roy

versus

Mr. Thomas J. Kenny.

Where a lessee cut trees contrary to the provisions of his first lease, and the lease was renewed (the lessor then not looking to the infringement of the terms of the lease in this respect), limitation was held to run from breach of contract, and not from lessor's knowledge of it, because the lessor might have known of it before.

Case.—THIS action has been brought to recover 60 rupees, the value of certain trees on the plaintiff's zemindary, which the defendant, as ijradar, is said to have cut down in the month of Kartic 1263 B. S. without leave or license of the plaintiff, and appropriated the same to his own use.

The defendant, while he denies having done the act, takes the following exceptions to the plaintiff's claim :—

1. That the suit is barred by Clause 16 of Section 1 of Act XIV. of 1859, inasmuch as it is clear from the plaintiff's own showing that the trees were cut upwards of six years ago.

2. That supposing for argument's sake that the suit is within time, still, when, by the very lease granted by the plaintiff, he forbade the defendant, farmer, from cutting any trees in his estate, and restrained his right or control over the same, he, the defendant, could not be made liable to the plaintiff's claim after a lapse of six years, especially as, under the circumstances stated, it behove the plaintiff, zemindar, to take care of his property, and ascertain in due time whether any waste has been done to it.

3. That, as the trees are said to have been cut in the year 1263 B. S., during the term of the first lease, which extended from the years 1261 to 1265 B. S., and that, as it was renewed in the year 1266, and remained in force up to the 30th Cheyt 1270 B. S., the plaintiff, proprietor, ought to have, at the interval between the termination and commencement of the two leases, ascertained whether or not any damage had been done to his property; and that, as he neglected to do so during the period of both the leases, he forfeits his right of action by the Statute of Limitation.

The plaintiff, on the other hand, argues that the defendant holding continuous possession, and being in sole charge of the zemindary with all its appurtenances by virtue of the two successive leases, it was not possible for him to take care of his property; and that all acts of waste, therefore, done by the farmer to the estate were consequently kept from the knowledge of the zemindar until the property came back to his possession. The plaintiff rests this argument on Section 9 of Act XIV. of 1859, and computes the period of limitation from the time the acts first became known to him.

Leaving any question of fact to be determined by the evidence adduced by the parties, I am of opinion that, during the period the defendant, farmer, held the zemindary in his possession, he bound himself by the stipulations of the lease to make good to the proprietor any loss or damage which he might have sustained on his property. It was not possible for the plaintiff, zemindar, nor was he required, to look after and enquire into the state of his property for which the farmer stood accountable to him. Section 9 of the Limitation Act does not appear to me to apply to the present case. I do not consider that the plaintiff's right of action was by means of *fraud* kept from his knowledge. It was an act of waste done by the defendant to the plaintiff's estate, while held by him in his possession, which the plaintiff had no means of knowing.

Notwithstanding the want of any specific provision in the Section referred to in this respect, I consider the plaintiff can maintain his right of action from the time he was placed in a position to discover the waste done to his property.

The kubooleut given by the defendant, which clearly sets forth "and I shall not cut down and dispose of any trees, nor allow

others to do so," *primâ facie* gives evidence that the farmer was wholly responsible to the zemindar for the due preservation of the property.

As regards the point urged by the defendant, that the plaintiff ought to have taken notice of the waste at the period intervening the termination and commencement of the two leases, so as to enable him to ascertain the damage sustained, and bring the action within due time, I think it to be erroneous, inasmuch as the first lease expired on 30th Cheyt 1265 B. S., and the subsequent one, which commenced just in the beginning of the ensuing year, is dated 23rd Maugh 1265, upwards of two months prior to the close of the first lease, so that the defendant, being in continuous possession of the zemindary, cannot be expected to have ascertained the extent of damages it has incurred.

Under these circumstances I consider that the cause of action in this case ought to accrue from the time plaintiff took possession of his estate at the expiration of the last lease, and became aware of the act of waste done to it; and his right of action, therefore, cannot reasonably be barred by the Statute of Limitation.

I beg leave to submit, for the decision and orders of the High Court, whether in this case, when the defendant, farmer, holding continuous and uninterrupted possession of an estate under different consecutive leases from the zemindar, binding himself by stipulations not to do, nor cause to be done, any kind of waste to the same, committed an act of injury to the property in his charge without the knowledge of the proprietor; he, the proprietor, can maintain his right of action after a lapse of six years from the date of the act, and compute the period of limitation from the date the estate reverted to his possession, and he was placed in a position to ascertain the extent of damages done to his property.

The two kubooleuts herein referred to are at the request of the parties, herewith submitted for the inspection of the Court.

Judgment of the High Court.—We certify our opinion as follows: The question referred to us in this case must be answered in the negative. The suit is not maintainable, inasmuch as the cause of action accrued more than six years before the suit was instituted. As a general rule of law, it may be said that the time of limitation runs from the period when the contract was broken, and not from the time that knowledge of the breach of contract first came to the plaintiff, whether the breach of contract was patent and discoverable, or whether it was concealed and undiscoverable.

The case for the plaintiff is, that the defendant occupied lands under a pottah in which he contracted not to cut down trees; that in breach of that contract he did cut down trees, but more than six years prior to the institution of the suit; that the lease in question expired on the 30th Cheyt 1265, being a little within the six years; that the cause of action did not arise till the expiry of the lease; and, therefore, that this suit for damages will lie. But the date of the expiry of the term of the lease does not affect the question. The cutting down the trees was the cause of action, and we see no force, and do not concur, in the argument that the fact of the defendant having contracted not to cut trees, must be construed as equivalent to a covenant on his part to surrender the lands with the trees still standing on the expiry of the lease. On the expiry of the lease, if not sooner, the plaintiff could, if he had chosen, have ascertained whether his trees had been cut or not; instead, however, of then complaining of the injury done to him, he granted a fresh lease of the same lands to the defendant. If the plaintiff really did not know until lately that the trees had been cut, he was certainly guilty of laches in not making enquiries respecting the property at an earlier period, and has no conceivable ground for complaint that he is not now entitled to recover.

The 12th August 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Transfer of decree by sale after attachment—Payment or adjustment by judgment-debtor to original decree-holder in fraud of purchaser.

Reference to the High Court by Mr. D. C. Linton, Judge of the Small Cause Court of Meherpore.

Hureenarain Chatterjee, *Plaintiff*,

versus

J. W. Smith and others, *Defendants*.

On the transfer of a decree by sale after attachment, any payment or adjustment of that decree made by the judgment-debtor to the original decree-holder in fraud of the purchaser, or of the attachment under which the sale to the purchaser took place, cannot defeat or affect the purchaser's rights.

Case.—THIS is an action brought by the plaintiff to recover from the first defendant rupees 139-14, being the amount of decree No. 514 of 1863, passed in his (first defendant's) favor, and which was attached and sold by public auction in this Court on the 26th January 1864, in execution of decree No. 1541 of 1862, obtained by the third defendant against the first defendant.

The real facts of the case are as follow:—

Rohomut Mundul, of Ramkistopore, the third defendant in the present suit, obtained in this Court, on the 20th December 1862, a decree for rupees 38-2 against W. Smith of Kutby, the first defendant in this suit. On the 17th December 1863, he made an application to the Court, praying that the amount of the above decree might be realized by the attachment and sale of the decree No. 514 of 1863, obtained by the first defendant against the second defendant. It was accordingly ordered to be attached on the 18th December 1863; and afterwards on the 11th January 1864, a further order was passed by my predecessor, Baboo Dwarkanath Roy, directing the sale of the attached decree, on the 26th January 1864, by putting up an ishtahar in the Court-house. On the 23rd December 1863, the first defendant also made an application to the Court to execute the attached decree against the second defendant; but on that day my predecessor, instead of stopping its execution as he should have done, ordered its execution, and the 14th January 1864 was fixed for sale of the property, if attached, of the judgment-debtor, Norim Mundle, the second defendant in the present suit. This process of attachment contained a memorandum that the decree has been attached in execution of decree No. 1541 of 1862 (decree-jaree case No. 418 of 1864). And the serving-peon reported that the Naib of the decree-holder (the first defendant in the present suit) could not point out the property of the judgment-debtor (the second defendant in the present suit); and submitted an ekrar, dated the 17th Pous 1270, corresponding with the 31st December 1863, given by him in the name of the first defendant, his master, to that effect.

In pursuance of the ishtahar issued on the 11th January 1864, as stated before, the above decree (No. 514 of 1863), was sold by public auction to the highest bidder on the 26th January 1864, and the plaintiff purchased it for 41 rupees, and was confirmed, on his application on the 25th February 1864, in the place of the first defendant as decree-holder by purchase. The purchaser (the plaintiff in the present suit) applied for execution on the 1st March 1864, and process of attachment was issued against the property of the judgment-debtor, Norim Mundle, the second defendant in the suit; but the serving-peon gave a return on the 9th Cheyt 1270, corresponding with 21st March 1864, that the decree-holder could not point out the property of the judgment-debtor. On the 19th March 1864, the plaintiff again applied to attach rupees 27-6-9, which had been deposited in this Court by one of the debtors of the second defendant in this suit in satisfaction of a decree he obtained against him. On this the judgment-debtor, the second defendant in the present suit, on the 28th March 1864, with his application, filed a receipt granted by the first defendant, and requested that, as he had already paid the amount of the decree, *viz.*, rupees 144-8 to the decree-holder (the first defendant), he should no longer be held liable under it.

On the other hand, the decree-holder by purchase (the plaintiff in this suit) made, on the 30th March 1864, an application to the Court, praying that, as the Naib of the first defendant has, in collusion with the second defendant, recovered the amount of the decree after its attachment, and, knowing it to be so from the *memorandum on the process of attachment*, and had granted a receipt signed by the first defendant to the second defendant as an acquittance for the debt due from him, the Court would be pleased to pass the necessary orders for the due realization of the amount of the decree purchased by him.

On these applications the Court passed the order, that the decree could not be twice executed against the judgment-debtor, the second defendant, he having already paid the money to the late decree-holder, and that the decree-holder by purchase, *i. e.*, the plaintiff in the present suit, may take such steps as he might think proper for the recovery of the amount alleged to have been unlawfully taken and appropriated by the first defendant.

Agreeably to the above order, the plaintiff has brought the present action.

The question now to be determined is, whether the plaintiff, the purchaser of the decree, is entitled, under the circumstances stated above, to recover the amount of the decree, and, if so, from whom, whether from the first defendant or the second defendant, or from both?

Although no notice was issued to the late decree-holder, the first defendant and the judgment-debtor, the second defendant, under Act VIII. of 1859, prohibiting the former from receiving the amount of decree from the latter, and the latter from paying the same to the former, as ought to have been done, I have not the least doubt that the late decree-holder, as well as the judgment-debtor, were fully cognizant of the fact of the attachment of the decree, subject of the present action, as a memo. was written at the top of the process of attachment. Besides, the first defendant has many suits in this Court, and has two pleaders and a mookhtear who attend Court daily. It is, therefore, not unlikely that they knew of the attachment of the decree in question which took place on the 28th December 1863, *i. e.*, long before the application for its execution had been filed by them (*viz.*, 23rd December 1863), especially when one of the pleaders of the first defendant was also the pleader engaged by the third defendant in Case No. 1541 of 1862, and who filed the application for its execution against his own client, the first defendant, and prayed for the attachment and sale of the decree, the subject of action. Moreover, the receipt granted by the first defendant *himself* for the sum of rupees 144-8 he had received from the second defendant in satisfaction of the decree in question, is dated the 17th Pous 1270 B. S., corresponding with the 31st December 1863, *i. e.*, the very day on which his Naib gave an ekrar in his name to the serving-peon, stating that he could point out the property of the judgment-debtor; while the accounts of the first defendant called for by the Court show that 100 rupees were received on the 31st December 1863, and 37 rupees on the 30th January 1864, *i. e.*, after the sale of the decree which took place on the 26th January 1864. And there is no credit in the accounts for the balance, though a receipt has been granted for the *full* amount of the decree, including costs. It also appears from the records of this Court that Bawool Biswas, the Naib of Mr. Smith, the first defendant, bid for the decree at the time of the sale, and this fact is not now denied by him; but he explains it away in a very unsatisfactory manner, as he says he forbad a pleader, but does not mention his name, not to bid for the decree. Mr. Smith also, on being asked by the Court if he referred to the account-books on 31st December 1863, when he signed the receipt, said no; and that it was solely on the faith of the representation made to him by his Naib Bawool Biswas that he signed the receipt.

These facts clearly show deliberate collusion on the part of the first defendant's Naib, and the second defendant to deceive the purchaser of the decree, and thus to frustrate his claim, and avoid the risk of taking the money from the defendant after attachment. And it is, therefore, equitable and just that both the first and second defendants should now be made liable for plaintiff's claim.

Under the circumstances of the case, I decree the case with costs against the first and second defendants, subject to the orders of the High Court.

Judgment of the High Court.—The decree obtained by Smith against Norim Mundle having been transferred from the original decree-holder (Smith) to the present plaintiff, any payment or adjustment of that decree in fraud of the plaintiff or of the attachment under which the sale to the plaintiff took place cannot defeat or affect the plaintiff's rights. As to the payments stated to have been made by the judgment-debtor to Smith, unless they were made through the Court, or duly certified to the Court according to Section 206 of the Code of Civil Procedure, they would be of no effect.

The proceedings taken by Smith to execute his decree after that decree had been itself attached, and when he must have well known (as is shown by the facts stated) that the decree and proceedings in execution were no longer under his sole control, in no way benefit him; and, if the Court is satisfied that the transactions between Smith or his agents and Mundle were collusive, and intended to defeat the just rights of others (a conclusion which is fully justified by the facts stated), the plaintiff is entitled to the decree which the Court has given in his favor.

The 17th August 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Limitation—Verbal admission of balance on hearing account read, unavailing—Subsequent advance—Suit for balance of accounts between Ryots and Indigo Factory (Section 8, Act XIV. of 1859, not applicable).

Reference to the High Court by Mr. C. D. Field, Officiating Judge of the Principal Court of Small Causes of Jessore.

Mr. John Doyle

versus

Edoo Gazee.

Messrs. R. T. Allan and *J. S. Rochfort* for Plaintiff.

No one for Defendant.

A verbal admission of a balance on hearing the items of an account read will not save a suit from being barred by limitation; nor will a subsequent advance avail to preserve any former right of suit.

Section 8, Act XIV. of 1859, does not apply to a suit for balance of accounts between ryots and an Indigo Factory.

Case.—THIS is an action brought by Mr. John Doyle, Manager, on behalf of the Bengal Indigo Company, to recover Rs. 32-14-7, the balance due by the defendant (as heir of his father and uncle) in an account stated with the Factory.

The first plea raised is that of limitation. The defendant's vakeel first urged that the three years' limit, contained in Clauses 9 and 10, Section 1, Act XIV. of 1859, was applicable to these cases, but he is clearly wrong on this point. The period of limitation by which they will be ruled is that found in Clause 16 of the same Section, *viz.*, six years, inasmuch as no other limitation is expressly provided by the law for actions on accounts.

It must be now seen whether this suit is after time, allowing six years as the period within which it should be brought. It is admitted that there were no mutual transactions between the Factory and Monoo and Hanif (father and uncle of the defendant) during the years 1859-60. In fact, the last mutual transactions were in 1858, and the accounts of 1858 are alleged to have been made up on 9th January 1859, and a balance struck in the presence of Monoo and Hanif.

If the time of limitation is to be calculated from 9th January 1859, the date of the account being stated, the suit is clearly barred as not having been instituted till May 1865.

There are, however, two points urged as sufficient to take the case out of the Statute:—*First*, it is alleged that, on the 22nd December 1860, Monoo and Hanif were again at the Factory, and, having heard the account read out, verbally admitted the balance, which was struck on the 9th January 1859. *Second*, that, subsequent to 22nd December 1860, they got four annas worth of Indigo seed, which, added to Rs. 32-10-7, the balance of January 1859, makes the amount of the present claim. The last point may be briefly disposed of. The four annas worth of seed was not included in the account stated on the 22nd December 1860, and therefore could not be used to keep alive any of the items of that account.

The transaction of the 22nd December 1860 requires, however, a few more remarks. It cannot be said to have been a statement or adjustment of accounts, for such an adjustment was made on the 9th January 1859; and reading over the same balance then struck, and a verbal admission of its correctness, cannot amount to a fresh statement or adjustment of accounts, so as to create a new period of limitation. Again, it is admitted that the parties, Monoo and Hanif, did not sign the accounts produced in December 1860. There was, therefore, no acknowledgment in writing within the meaning of Section 4, Act XIV. of 1859 (the extension of Lord Tenterden's Act to India), which could create a new period of limitation.

For these reasons I am of opinion that the transaction of the 22nd December 1860 could have no legal effect; that the cause of action accrued on 9th January 1859, when the adjustment was made between the parties; and that this suit *is*, therefore, barred as not having been instituted till more than six years after this latter date. I give judgment for the defendant, contingent on the opinion of the High Court coinciding with the above decision on the point in question.

Judgment of the High Court.—The accounts were made up, and a balance against the ryots was struck, they being present and consenting, in January 1859.

There were no other transactions until December 1860, when the account was, it is stated, again read over, and the ryots verbally

admitted the same balance. Some time after the last date, four annas worth of Indigo seed was, it is said, advanced to the ryots. Assuming that Clause 16, Section 1 of Act XIV. of 1859, governs the case, we think the Judge rightly held that the suit was barred by limitation, more than six years having elapsed from the accruing of the cause of action. The verbal admission made in December 1860 by the ryots, on hearing the accounts again read, is of no avail to prevent the bar, nor was the subsequent advance of seed of any effect whatever in preserving any former right of suit.

The 8th Section of the Act, which relates to the computation of the period of limitation in suits for balance of accounts current between merchants and traders who have had mutual dealings, is wholly inapplicable to the present case.

Mr. Allan referred us to the 9th Clause of Section 1. The facts of the case do not, in our opinion, admit of application of that Clause, and even assuming here a breach of contract within its provisions, this suit is not brought in due time, *viz.*, within three years from the time when the money became due, or the breach occurred.

The 18th August 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Jurisdiction (of Small Cause Court)—Suit for damages not exceeding 500 Rs. under a kubooleut under which higher damages may be payable—Cause of Action (Refusal to perform contract)—Onus probandi.

References to the High Court by Mr. C. D. Linton, Judge of the Small Cause Court of Meherpore.

J. W. Smith, *Plaintiff,*

versus

Gopal Sheikh and others, *Defendants.*

The jurisdiction of a Small Cause Court in a suit on a kubooleut for damages not exceeding 500 rupees is not affected, because damages exceeding that sum may be payable under the same kubooleut.

Where the refusal to perform a contract can be proved by evidence, which shows that a party has utterly renounced the contract, or has put it out of his own power to perform it, the injured party may at his option sue at once, or wait till the time when the act was to be done. But the *onus probandi* in such a case is on the plaintiff.

Case.—THE plaintiff in this case sued the defendant for damages on account of breach of contract committed by the latter by not cultivating certain quantities of land with the Indigo plant in the year 1863. He claimed by his plaint at the rate of 10 rupees per beegah, for 10 beegahs, *viz.*, 100 rupees, the sum which defendant agreed to pay as stated in the kubooleut herewith sent.

The defendant denied the contract and receipt of the advance mentioned therein, and the three following preliminary objections were taken by his pleader in bar of the suit, *viz.*, *1stly*, that the kubooleut did not bear a sufficient stamp; *2ndly*, that the Small Cause Court had no jurisdiction to try the case, because the amount of damages as laid in plaint, if taken for ten years (the term mentioned in the kubooleut for sowing Indigo), would exceed the amount cognizable by the said Court, and the defendant repudiated the kubooleut itself; and, *3rdly*, that damages could not be recovered for 1863, as it appears from the wording of the kubooleut that the defendant was to cultivate his marked and measured land between 1st September and 30th November, and sow Indigo thereon; and it is not distinctly stated in the kubooleut if in September of 1863, or in September of 1864, the plant was to be delivered.

I overruled the first objection on the ground that, in calculating the value of the subject-matter of the contract, regard must be had to the consideration or immediate inducement for the undertaking or promise sought to be enforced, and not the value of the thing concerning which the contract has been made; for, if the consideration does not exceed 50 rupees, it falls within the operation of Section 4, Schedule A of Act X. of 1862; and that the proper stamp is the stamp which the kubooleut bears, *viz.*, one anna, although the subject-matter of it, or the thing to which it relates, or the payment of 10 rupees per beegah, which I have, on the evidence in the case, treated as a penalty, may far exceed that value, and the breach of it may consequently give rise to a claim for damages far surpassing 50 rupees; but if the High Court should be of opinion that the kubooleut ought to bear a higher stamp than it already bears, the plaintiff has expressed his willingness to pay the same.

I overruled the second objection on the following ground: As a suit for damages

for 100 rupees, it is properly brought in this Court, as Sections 6 and 7 of Act XI. of 1865 enacts:—

6. "The following are the suits which "shall be cognizable by Courts of Small "Causes, namely, claims for money due on "bond or other contract, or for rent, or for "personal property, or for the value of such "property, or for damages, when the debt, "damage, or demand, does not exceed in "amount or value the sum of 500 rupees, "whether in balance of account or otherwise, "provided that no action shall lie in any such "Court:—

(1.)—"On a balance of partnership account, "unless the balance shall have been struck "by the parties or their agents.

(2.)—"For a share or part of a share under "an intestacy, or for a legacy or part of a "legacy under a will.

(3.)—"For the recovery of damages on "account of an alleged personal injury, unless "actual pecuniary damage shall have resulted "from the injury.

(4.)—"For any claim for the rent of land, "or other claim for which a suit may now "be brought before a Revenue Officer, unless, "as regards arrears of rent for which such "suit may be brought, the Judge of the Court "of Small Causes shall have been expressly "invested by the Local Government with "jurisdiction over claims to such arrears.

7.—"The Local Government may extend "the jurisdiction of any Court of Small "Causes in suits of the nature described in "the last preceding Section, and thereby "made cognizable by Courts of Small Causes "to an amount not exceeding 1,000 rupees."

But as it was impossible to pronounce whether the plaintiff was entitled to damages or not, until it was settled whether the kubooleut filed was genuine or not, I held that it was competent for me to consider that question, and that an objection to the genuineness of the kubooleut was not sufficient to take the decision of the case out of my hands, the damages claimed being under 500 rupees. Had the kubooleut provided for payment of a sum *in solido*, exceeding the amount cognizable by this Court, and that sum was payable by instalments, and default had been made in payment of the first instalment, and an action had been brought in this Court for the said instalment, and the defendant had repudiated the contract itself, I think in that case I should have held that I had no jurisdiction in the matter, as the whole amount of the contract, indeed the contract itself, would have been disputed, and, to ascertain the grounds on which the defendant disputed the amount, it would be necessary to go into the matter of the whole contract, which, I think, I would have had no power to do. But the present case appears to me to be different, and is, in my opinion, cognizable by this Court. The third objection has been overruled, on the ground that it is not mentioned in the kubooleut that, in the September of 1863, the Indigo was to be cut and delivered to the Factory, and the evidence in the case has proved that the Indigo sown in 1863 is to be cut and delivered in the September of 1864.

The above objections have been (subject to the opinion of the High Court) overruled, and a decree passed on the merits of the case in plaintiff's favor for the actual loss sustained by him.

Case No. 288 of 1865.—The objections are the same in this case, with the further objection that the action is premature, inasmuch as the Indigo to be sown in 1864 is, according to the plaintiff's own showing, to be delivered in September 1865, and I have overruled this objection, as it is proved that defendant did not sow Indigo between September and November 1864; nor has the defendant shown or proved that he is or will be in a position to deliver Indigo plant in September of 1865—Indigo plant not being a marketable article. In the case of Philpotts *v.* Evans, 5 M. and W. 475, Parke, B., stated his opinion that no action would have lain for breach of contract upon the mere receipt of the notice (*i. e.*, notice from defendant to plaintiff that he could not accept corn if delivered), but that the plaintiff was bound to wait until the time arrived for delivery of the wheat to see whether the defendant would then receive it. This position, however, was denied by the Queen's Bench, and they have laid it down that where a refusal to perform a contract can be proved by evidence, which shows that the party has utterly renounced the contract, or has put it out of his own power to perform it, the injured party may at his option sue at once, or wait till the time when the act was to be done. (*See* Hochster *v.* DeLatour, 2 E. and B. 678).

Case No. 284 of 1865.—Besides the above preliminary objections, a further objection taken in this case is, that the kubooleut, the subject of action, is not a valid one in the eye of the law, for its terms are one-sided, and there is no mutuality or reciprocity of contract or liability.

The contract, as drawn up, is in form unilateral or one-sided; that though such is its form, it is essentially a bi-lateral contract, by which both parties have become bound to each other, the one expressly, the other by implication. There is an implied agreement indeed in every contract, that the parties will severally perform what justice requires of them in fulfilment of, or rather as a consequence of, the stipulation actually expressed. It follows that in the present contract, if the party whose obligations are implied rather than expressed, fails or refuses to perform his part of the agreement, he will be liable to pay to the other contracting party such damages as he has sustained by such neglect or refusal, and an agreement to do so will be implied.

Under this view, looking solely to the nature of the agreement, I am of opinion that it discloses a mutuality of assent and obligation, and is, therefore, a valid contract. Moreover, in the present instance, it appears that a valuable consideration in the shape of money advance was paid by the plaintiff in the year 1863 on account of the particular service which the defendant had agreed to render, and which he has failed to perform, and this payment is also sufficient consideration to support the present contract so far as it is before the Court.

The original plaint and contract in the first case are herewith sent. The plaint and contract in the other case seem similar.

Judgment of the High Court.—The kubooleut was sufficiently stamped under the provisions of the Stamp Act, which is referred to in the judgment.

The suit is within the jurisdiction of the Court, for the amount of damages which the plaintiff sues to recover does not exceed 500 rupees. It in no way affects the Court's jurisdiction in this suit, that damages, larger in amount than 500 rupees, may possibly become payable under this kubooleut; in the present suit, the plaintiff's claim does not exceed that sum.

The kubooleut was given in August 1863. We have not a copy of the plaint; but we understand that the plaintiff's claim in the first of the two suits is for the omission to cultivate during the immediately subsequent year of cultivation, and to deliver the plant in due time, that is, as the evidence shows, in or about September 1864. If the evidence shows that this is the nature of the plaintiff's claim, the Judge should decree in accordance therewith, taking due care that the plaint, evidence, and decree, are in conformity, one with another; and that the latter distinctly shows the sum awarded, and the period for which the damage was awarded. The kubooleut contains nothing to render doubtful to what years and seasons its provisions relate.

In the second suit, in which damages are claimed for the omission to cultivate and deliver Indigo plant for the Indigo year, 1864-65, we think that the objection, that the suit was prematurely instituted, is a valid one. This suit was instituted in April last. The Judge of the Small Cause Court states: "I have overruled this objection, as "it is proved that defendant did not sow "Indigo between September and Novem-"ber of 1864, nor has the defendant shown "or proved that he is, or will be, in a posi-"tion to deliver Indigo plant in September "of 1865—Indigo plant not being a market-"able article."

According to the rule of English law, to which the Judge refers, and which may perhaps fairly be applied in this country, where a refusal to perform a contract can be proved by evidence which shows that the party has utterly renounced the contract, or has put it out of his own power to perform it, the injured party may, at his option, sue at once, or wait till the time when the act was to be done.

The rule, as stated, applies when the contract has been renounced, or the defendant has disabled himself from performance. All that appears in the present case is, that the defendant did not sow between the months of September and November 1864. He may have broken his engagement in this and in other respects, but such breaches are not equivalent to a renunciation of the contract. The Judge observes that *the defendant* has not proved that he is or will be in a position to deliver Indigo plant in September 1865. It is for the plaintiff to prove whatever is requisite to enable him to maintain his suit as brought, and this he has failed to do. He has shown neither a renunciation of the contract by the defendant, nor that the defendant has put it out of his own power to perform it. It was admitted on the argument before us that the ryot might, by sowing seed at a time subsequently to the date of the commencement of this suit, grow Indigo plant for delivery in September. Whether he has, in fact, done so or not, or whether a delivery by him of Indigo purchased elsewhere, or the produce of other lands, would be in strict law a compliance

with his kubooleut, it is needless now to consider. The question before us is, whether, upon the facts stated, the suit can be maintained under the rule of law which is referred to, and we are of opinion that it cannot, the plaintiff having failed to show such circumstances as are requisite to render the rule applicable. We have not failed to observe that the defendant denied the contract, but this was after suit brought, and was not a renunciation, such as the rule contemplates.

The objection of want of mutuality has already been held not to apply to a contract in substance like this. (*See* Watson *vs.* Anundo Sirdar, a case decided by the Sudder Court, 5th October 1861.)

The 18th August 1865.

Present :

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Contracts between Zemindars and Putneedars under Section 10, Regulation XX. of 1817 (not affected by Act VIII. of 1862, B. C.)—Maintenance of Zemindary Daks.

Reference to the High Court by Mr. C. D. Field, Officiating Judge of the Principal Court of Small Causes of Jessore.

Saroda Soondery Debea, *Plaintiff,*

versus

Wooma Churn Sircar, *Defendant.*

The terms of a contract made while Section 10, Regulation XX., 1817, was in force between a zemindar and his putnee-lessees, having imposed on the latter the charge of the maintenance of the zemindary dâk, this liability is not affected by the subsequent repeal of the Regulation by Act VIII. of 1862, B. C.

Case No. 1733.—In this case the plaintiff, as zemindar, relying on a clause in the putnee lease, sues the defendant, her putnee-lessee, to recover the sum of rupees 8-8, being zemindary dâk tax paid by the lessor under Act VIII. (B. C.) of 1862. The defendant holds an eight-anna share of six mouzahs, the sudder jumma of which proportioned to his share is rupees 661-3-13. The sudder jumma of these mouzahs was fixed at the time of the Permanent Settlement, and is admitted between the parties. For the year 1863, rupees 5-1-9, being the amount actually paid at an assessed rate of 12½ annas per cent., and for the year 1864, rupees 36-3, the amount paid for a portion of the year at an assessed rate of 8 annas per cent., are the items which make up the claim, and there is no dispute as to the correctness of the calculation, or as to the actual payment by the zemindar of these sums.

The defence consists of an objection to the jurisdiction of this Court and a demurrer. It is urged—*1st*, that the case should have been brought in the Revenue Court, as it is in the nature of a claim for rent; *2nd*, that defendant is not liable under the terms of his lease.

1st.—And now of these in order. If the suit were cognizable in the Revenue Courts, it would be so cognizable on the ground that it falls within the purview of Clause 4, Section 23, Act X. of 1859 : for there is no other portion of the law that can apply. It seems to me that the words "or the like" in that Clause do not include a claim like the present one. In the first place the sum sought to be recovered is not rent as such. It is a sum alleged to be recoverable by virtue of a stipulation, which certainly is contained in a lease, and which, if not so contained, could not be argued for a moment to bring the case within the jurisdiction of the Revenue Courts. It would as fairly be contended that an action for damages for breach of any other covenant in a lease should be brought in the Revenue Court, because such covenant is connected with, or relates to, land. That such is not the case will clearly appear from the Cases No. 506 of 1862, Gooroo Persaud Sircar, appellant, 19th March 1863, and No. 402 of 1863, Alum Chunder Shaw Chowdhoory and others, appellants, 22nd March 1864. From the numerous cases decided as falling or not falling within the meaning of Clause 4, Section 23, Act X. of 1859, the principle is, I think, deducible that rent can be sued for as rent in the Revenue Courts, but when

other claims are linked with that for rent, the suit must be brought in the Civil Court. (*See* the cases collected in my Rent Law Procedure in Bengal, p. 40). The present claim not being for rent at all as rent, I hold that the Revenue Court has not jurisdiction, and that the suit is properly brought in the Small Cause Court.

2nd.—With respect to the ground on which the defendant demurs to plaintiff's claim, it will be necessary to recur to the Clause in the lease on which the plaintiff founds his right to recover. It runs as follows: "According to the orders of the "Hakeems, whatever putwaries, chowkee-"dars, or dâk stages now are, or may here-"after be, should it be necessary to remove "or appoint or establish such, I shall do it "according to usage, and their pay and "expenditure whatever it may be, it shall "be my duty to disburse, and such shall "have no connection with your sircar." Lower down in the lease occurs the following Clause: "And on account of rent or "other matters, whatever orders may from "time to time be made on the zemindar by "Government, shall have equal application "to my putnee talook."

For the defendant it is argued that, by the above stipulations, he only covenanted to pay dâk runners, if any requisitions should be made for them by the Magistrate in consequence of the dâk being conveyed through the lands comprised in his putnee lease. It was certainly the custom under Clause 4, Section 10, Regulation XX. of 1817, to call upon those landholders only to supply dâk-runners, through or near whose lands the line of dâk ran, and the argument has some semblance of reasonableness, looking to this custom. It is admitted that the dâk passes near, but not through the lands contained in the putnee lease, and it is also admitted that no requisition for dâk-runners has ever been made on the defendant since the grant of the lease in 1253, while the line of dâk has remained stationary. That such was the custom in most districts, I believe to be a fact; but that such a custom was not warranted by the express wording of Clause 4, Section 10, Regulation XX. of 1817, will be very clear from a perusal of the law. The support of the zemindary dâk was a public burden, and, as such, distributable over the entire of the land, every part of which was as chargeable therewith as with the Government Revenue. Section 5, Act VIII. (B. C.) of 1862, therefore, introduced no new principle when the charges for this head were so expressly distributed by being apportioned rateably on the Sudder Jumma of the parties declared liable to pay the tax.

Under English law, "there are," writes Mr. Chitty in his work on Contracts, page 311, "certain taxes and rates which, "though primarily chargeable on the "tenant, yet, if the demise contain no pro-"vision to the contrary, must be ultimately "borne by the landlord; whilst there are "others which the tenant even, as between "himself and his landlord, is impliedly bound "to discharge." The tenant may, however, become liable to bear the burden of taxes which would otherwise be payable by the landlord, and might be deducted from the rent *by entering into a contract to pay them*, and this contract need not be in express terms, for any words *shewing clearly that the landlord was to have the full rent reserved* without any deduction in respect of charges upon the premises are sufficient to fix the "tenant." This is a reasonable principle, and can be fairly applied in the present case; the tax or rate is one for which the landlord is primarily liable, as being payable by those only who pay revenue direct to Government (*vide* Section 3, Act VIII. [B. C.] of 1862); are then the terms of the contract sufficient to make the lessee liable? The lease being drawn many years before Act VIII. (B. C.) of 1862 was passed, the lessor could have made no express provision for the rate assessed under this Act; but I think the Clauses quoted above, and the whole tenor of the instrument, show that, at the time the lease was drawn, it was mutually understood by both parties that the zemindar was to have the whole of the reserved rent, and that future claims by Government were to fall on the lessee. There is a covenant that no deduction of the rent, reserved, was ever to be asked or allowed on account of unfavorable seasons or any other cause which favors this view. Although for several years the putneedar has not been called upon to pay any of the charges mentioned in the lease, yet he cannot now justly argue that he should not, therefore, be ever called upon to pay them. The action of Government in imposing a new burden was a contingency contemplated, and was a condition precedent to the zemindar's right to sue. As soon

as Government imposed the tax, the zemindar, relying on the Clause in his lease, came into Court, and no *laches* are attributable to him. It is admitted that the zemindar has more to pay now than he had under the former system for the maintenance of the zemindary dâk, and I think he may fairly call upon the putneedar to act up to his agreement, now that an increase of expenditure has taken place with respect to one of the items contemplated by the lease. It must be observed that, if the putneedar be not held liable in the present case, he cannot be called upon to pay anything in the present state of the law; and the covenant in his lease, as far as it concerns this item, will have no effect.

Under this view of the case, I gave judgment for the plaintiff, contingent on the decision of the High Court supporting my finding on the two points raised by the defendant.

I refer the case to the High Court, as the point is one of some importance, and there are three other cases depending upon its decision, which will doubtless form a precedent for several similar cases in this district.

Saroda Soondery Dabea, *Plaintiff*,

versus

Tarinee Churn Shah, *Defendant*.

Case No. 1735.—THIS case differs slightly from Case No. 1733, so I have thought it better to refer to it separately. Plaintiff's cause of action, as founded on the Clause in the putnee lease, is by no means so clear as in the former case. There is no special mention of dâk stages, and it has been urged that, even if by reason of such special mention in the lease the former action could be sustained, yet the present action is not sustainable by reason of the absence of all such special mention. The Clause in the present lease is worded thus generally:—

"Any requisitions or orders that may issue "from the Civil, Criminal, or Revenue Au-"thorities on the said mouzahs shall be com-"plied with by me, and any expenses that "may in consequence be incurred shall be "paid by me, and shall have no concern with "you."

It appears to me that, under this Clause, the putneedar would have had to pay the cost of dâk-runners, had a requisition for them been made on the zemindar under Clause 4, Section 10, Regulation XX. of 1817, and that, although dâk stages or runners are not expressly mentioned in the lease, yet they are within the probable requisitions from the Criminal Authorities which were contemplated by the contracting parties at the time of making the contract. The zemindar may plead that he is, by a change in the wording of the law, directly made liable to pay what he was before entitled to have paid by the putneedar, and that, on the equity of the case, the putneedar is bound to reimburse him, as the law never intended to transfer the liability, or interfere with special contracts between landlords and lessees. If the plaintiff in the former case is held entitled to recover, it appears to me that, applying the same principles to the present case, the present plaintiff is equally entitled to a decree.

Judgment of the High Court.—In these two cases, which have been well discussed by the Judge of the Small Cause Court, the matter to be determined in each case is the right construction of the contract between the zemindar and his lessee. The charge and duty imposed on zemindars and others by the law in force when these putnee leases were made (Regulation XX., 1817, Section 10) was altered as to Bengal by Act VIII. of 1862 of the Bengal Council, which repealed the Regulation. By the new law the Magistrate, and not the zemindar, appoints and pays the dâk-runners by whom zemindary dâks are conveyed, and express provision is made for raising the necessary funds by assessment of the zemindars and other persons paying revenue direct to Government in respect of lands situate within the district. The old system is improved, but the charge in an altered form still remains, and there is nothing in the new law substantially to affect the former liability. As to contracts or engagements made or to be made by zemindars with any persons holding under them, it is expressly provided by Section 12 that nothing in the Act shall in any way affect or alter them.

The contract in one of these cases clearly imposed on the lessee the charge of the maintenance of the zemindary dâk under the old Regulation, and is in such terms that it continues equally applicable to the charge as it exists under the new law. The terms of the contract are distinct, and the Act itself reserves expressly all rights arising from private contracts. We, therefore, agree with the Judge in this case.

In the other suit, the obligation imposed by the Clause in the lease is not so clearly defined. The lessee undertakes (as is stated in the case) that requisitions and orders from the Civil and Criminal Authorities on the mouzahs shall be complied with by him, and any expenses incurred thereby shall be paid by him.

The words of the kubooleut which we quote* do not in our judgment make the putneedar liable to the present zemindary dâk assessment. It is doubtful if the terms used would under the old law have rendered the putneedar liable. We think that they are certainly insufficient to impose on him the tax which by the Act is now imposed on the zemindar. We cannot, therefore, concur in the Court's decision in this case.

* আদালত ও ফৌজদারি ও কালেক্টরি ওগয়রহ হাকিমানের হুকুম মৌজাহায়ের প্রতি যখন যে সাদের হয় তাহা জওয়াব দিহি ও খরচ খরচা ওগয়রহ জিম্মা আমার হুকুম মৌজাহায়ের প্রতি যখন যে হয় তাহার জওয়াব দিহি ও খরচ খরচা ওগয়রহ জিম্মা আমার।

I am responsible and liable for the costs of all orders with regard to these villages which may be at any time passed by Civil, Criminal, and Revenue Courts and Authorities.

The 19th August 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Suit for damages (by lessor against third party).

Reference to the High Court by Mr. C. D. Linton, Judge of the Small Cause Court of Chooadanga.

Dheermoney Dossee, *Plaintiff,*

versus

J. C. Croft, *Defendant.*

A lessor may sue a third party for damages for injury sustained by reason of excavations made by the defendant on lands leased out by the plaintiff to a lessee.

Case.—THIS is an action brought by the plaintiff to recover from the defendant rupees 31-12, being damages alleged to have been sustained by her, owing to defendant's having without her consent excavated 1½ cottahs of land in Allikdia village, which is her zemindary, putnee, and kaemia izara, and having burnt bricks on another 1½ cottahs.

The plaint runs as follows:—

"Mouzah Munirampore is in Turruf Allik-"dia, which is my zemindary, putnee, and "kaemia izara. Defendant, without my con-"sent, in the month of Aughran 1271, ex-"cavated 1½ cottahs of land as per boundaries "at foot, situated in the above village, from "Aughran to Falgoon, and prepared about "1½ lakhs of bricks, and burnt the same "bricks on another 1½ cottahs of land. The "land to the quantity of 3 cottahs has been "damaged, for which I pray for compensation "of rupees 31-12."

And the damages claimed are made up thus:

	Rs.	A.	P.
Wages to fill up 7 pits excavated	24	0	0
Rent for 10 years of 1½ cottahs of land on which bricks have been burnt and made useless ...	0	12	0
Price of earth to fill up ...	7	0	0
Total ... Rs.	31	12	0

The defendant admits that he has excavated 1½ cottahs, and burnt bricks on another 1½ cottahs, in Allikdia village, but that he *did so* with the permission of Mr. Hills, the *izardar* of the said village; that he has paid Mr. Hills 100 rupees on account of any lands required by him for brick-making purposes within Mr. Hills' elaka; that he is not answerable to the plaintiff for the said land so excavated, but to Mr. Hills, the izardar; and that the damages claimed are excessive, and not recoverable in the mode in which they are claimed.

The evidence in support of the defence is as follows:—

John Henry Jones on oath saith:—I am an assistant of Mr. Hills, and have charge of Peerpore Factory. This letter, bearing date 16th March 1864, bears my signature, and it was written by me at Mr. Hills' request. The lands which have been dug by defendant is within lands held by Mr. Hills on izara. I gave no authority for defendant to dig the lands, subject of action; the lands mentioned in the letter were lands solely talookdary or zemindary, which Mr. Hills had full power to give away for purposes of brick-making. I believe I expressed to defendant, as also to Mr. Dombal, that the Allikdia lands I had no power to give away. I went on one occasion with defendant and Dombal to a place near the river at Allikdia, where they were making bricks, and which impeded the road for carts from Allikdia to Akondobaria, and I then proposed to them to remove the brick-

making place to a place lower down the river to some *potit* lands: as far as I can remember, somewhere near Hateekata. This *potit* land, to the best of my belief, was within Mr. Hills' izara lands, and I believe the bricks were afterwards made on the *potit* lands. I was present when the brick-kiln on the first-mentioned lands was altered at my proposal. The Allikdia lands are Mr. Hills' izara lands. I have received from defendant 100 rupees, as I believe on account of Gokulkhally. I believe the lands at Gokulkhally were measured before I received 100 rupees; and I believe, after measurement, I forwarded the measurement, and asked for the money. Defendant objected to the measurement I forwarded him, and asked for a measurement, and it was re-measured, as I hear, in Mr. Dombal's presence. I was not personally present at either of the measurements, but my men were. The measurement, as far as I remember, was less than the original measurement. I don't think that defendant has taken any other lands than that measured in Gokulkhally, in which Mr. Hills has zemindary or talookdary rights. I don't remember when Mr. Dombal paid me 100 rupees, if he then said that amount exceeded the value of the Gokulkhally measured lands.

Examined.—Mr. Hills has no power to dig earth in his izara, or authorize any other person to do so.

To the Court.—I believe it was understood that defendant was to take up lands in Allikdia, or in any other part for brick-making purposes, with the provision that Mr. Hills had the power to allow him to do so. I expressed to Mr. Dombal, as also to defendant, that Mr. Hills had no power to allow them to dig lands in Allikdia. Defendant had taken possession of lands in Allikdia, when I remonstrated, and then the letter filed by defendant was written by me at Mr. Hills' request. I don't remember if I told Mr. Hills that defendant had taken lands in Allikdia; but I told Mr. Hills, would he consent to give defendant lands on the same terms as Mr. Smith. Mr. Hills did not mention to me, nor I to him, what particular lands were to be made over.

Henry John Christian Croft on oath said to defendant's Pleader.—I don't recollect who was the plaintiff in the action against me for value of trees used, and for excavating earth. Mr. Jones did inform me, after date of this action, that plaintiff was owner of the lands, subject of action, but that he would get this action settled.

John Henry Jones re-called.—The reason I told defendant I would have this action settled was because, from what defendant told me, I understood that he had misunderstood the meaning of my letter, and that I had power to give what I had no power to give.

Thomas John Dover Durup de Dombal on oath saith:—I am defendant's assistant. I know the lands, subject of action. It is in a place called Jolly Bheel. The lands, subject of action, were not specially made over or pointed out to defendant for brick-making purposes; but all lands in Mr. Hills' elaka were made over by Mr. Jones by his letter filed in Court; but lands were not pointed out, only some lands near Hateekatta were pointed out by Mr. Jones for brick-making purposes. Mr. Jones said that defendant could make bricks near the Allikdia Ghât, provided he did not shut up the road, and the brick-field was removed a little further in, and the brick-kiln cut. This was done at Mr. Jones' proposal, and in his presence. Mr. Jones did not, before date of this action, tell me or defendant that he had no power to make over lands in Allikdia. The lands, subject of action, were excavated by my orders, as defendant told me to make bricks wherever I thought fit; and after that the letter was written by Mr. Jones, when the lands, subject of action, were excavated. I was under the impression that it would be made over to the defendant by the Government. I cannot say exactly if for lands, subject to action, Mr. Jones asked for money; but Mr. Jones' Naib asked to have the lands, subject of action, as also other lands very near it, measured up; but no measurement took place, as the bricks were then being made, and after this time no lands, except those at Gokulkhally, have been measured. According to Mr. Jones' letter, the lands in Gokulkhally came to 75 or 76 rupees, but on measurement it came to 26 to 30 rupees. The re-measurement was made by Mr. Jones' Takedar or Ameen, and taken down by Mr. Jones' Naib and myself. The Naib then asked me for money—20 rupees, and he asked for this sum, as he said we had taken up a lot of other lands along the road, *i. e.*, Chooadanga and Meherpore road, and this sum would be only paying them on account. Then eventually, at defendant's request, I paid Mr. Jones 100 rupees. Mr. Jones was then aware (because I and his Naib

spoke about the lands) that that was in excess of the lands at Gokulkhally.

To the Court.—It was after the Act or Circular that went round to the different Government Engineers, I told defendant to write to Mr. Hills about lands which he required for bricks on the road. Previous to that time the lands, subject of action, had been excavated.

The letter written by Mr. Jones to defendant, by Mr. Smith to defendant, and the receipt granted by Mr. Jones to defendant, are as follows :—

To

H. J. C. CROFT, ESQ.,

Peerpore, 16th March 1865.

MY DEAR SIR,—Mr. Hills has authorized me to propose the same terms as those offered you by Mr. James White Smith for any land taken up by you for brick-making within his elaka. Payment to be made within a week after the measurement of the land by Ameens appointed by both parties.

Yours very sincerely,

(Signed) J. H. JONES.

Kally, 24th January 1865.

To

H. J. C. CROFT, ESQ., *Amjoopy.*

MY DEAR SIR,—I am willing to let you have lands for brick-making on the following terms : For the land you dig clay for the moulding of the bricks, and that on which you make your kilns, 30 rupees per beegah. For the land on which you dry and mould your bricks on, 5 rupees a beegah, and for the land you kopany and take eight inches off the top, 4 rupees per beegah. I have ordered my gomastah to go at once, and mark out and measure the lands you require for the brick-making.

I am, My Dear Sir,

Yours faithfully,

(Signed) J. WHITE SMITH.

No. 150...Rs. 100.

Received from Mr. T. Durup de Dombal the sum of 100 rupees only, on account for payment of land taken up for bricks, &c.

(Signed) J. H. JONES,
for
JAMES HILLS.

CHOOADANGA :
13th April 1865.

It is quite clear from Mr. Dombal's evidence that the land, subject of action, had been excavated by him without the leave and license of Mr. Jones or Mr. Hills: for he says that, when it was excavated, he was under the impression that the land would be made over to the defendant by the Government, and it was not until the letter or circular referred to in his evidence that he told defendant to write to Mr. Hills about lands which he required for bricks, and it may be gathered from Mr. Jones' evidence, as also from the wording of the receipt granted by Mr. Jones and from Mr. Dombal's evidence, that 100 rupees was paid for lands generally, and in that may be included the value of the lands, subject of action. It may also be inferred from Mr. Jones' subsequent acts that he ratified the acts of the defendants in excavating the lands, subject of action, but it is quite immaterial, for the purpose of the present case, to take into consideration whether defendant did or did not, with Mr. Hills' leave and license, excavate the lands, subject of action, or that his act was subsequently ratified, as the kubooleut granted by Mr. Hills to plaintiff distinctly provides that he is not to dig for bricks, or allow any body to do so in Allikdia or other villages, and the kubooleut, so far as it concerns the present case, runs as follows :—

"I shall preserve the boundaries of the "villages very carefully. I shall be in "possession till the term of the lease. I "shall not excavate tanks or cultivate new "Indigo, or open a cootee of silk, or dig "for bricks, nor allow any body to do so "in the said villages. If I do or allow it "to be done, it will not be of effect or stand, "and I shall be responsible for any damages "which you will sustain thereby."

If Mr. Hills has not the right or power to excavate lands (which his kubooleut shows he has not), he cannot delegate such an authority to the defendant (which is not proved) which will protect the latter from responsibility; and, even if the defendant did excavate the lands, subject of action (which is a tortuous act) under the direction or with the assent of Mr. Hills, each is liable at suit of the plaintiff. The defendant is liable because the authority of Mr. Hills cannot justify his wrongful act, and Mr. Hills for allowing the act to be done is likewise liable according to the maxim "Respondent superior." "If," observes Sir Wm. Blackstone, "a servant commit a trespass by the command or encouragement of his master, the

"master shall be guilty of it, though the "servant is not thereby excused, for he is "only to obey his master in matters that "are honest and lawful."

The defendant's pleader argues that Mr. Hills can only support this case against his client, and that his client is alone responsible to Mr. Hills, although it be true that trespass will only lie at suit of one in exclusive possession of land, actual or constructive. Our law, which adapts its remedy to the nature of the right invaded, allows in many cases one who is out of possession of land to recover damages in some other form of action for an injury done to it. Thus, a reversioner may sue in case (though not in trespass) for any injury of a permanent kind done to his reversion. Upon this subject, Cox *vs.* Ghee, 5 C. B. 533 (Marthe *vs.* Kenrick, 13 B. C. B. 188), is an useful authority. There the plaintiff was seised in fee of land upon which the burgesses of a certain town had a right during a portion of the years to depasture their cattle, and of which also during such period they were entitled to the exclusive possession. Trespasses having been committed as well to the surface as to the sub-soil of the land in question (whilst in the occupation of the burgesses), it was held that, in respect of the latter (the injury to the sub-soil), an action would well lie at suit of the plaintiff (the tenant-in-fee), but that in respect of the former (the injury to the surface of the land) it would not.

That the plaintiff is the proper party to bring this action against the defendant and Mr. Hills for the permanent injury done to the land, is quite evident from the decision in the above case. Mr. Hills could, if he chose, support trespass against the defendant for any injury to his possession, and the plaintiff may at the same time support an action in the case, if the injury were sufficient to prejudice her right and interest, and a recovery by one will be no bar to an action by the other. But the plaintiff, when she has sued, must allege, and prove such a permanent injury as necessarily affects her interest. That this has been alleged and proved, is evident from the wording of the plaint and defendant's admission. Suppose trees are excepted in a lease, who is the proper party to sue, the lessee or lessor? The lessor, no doubt, as the lessee has no interest therein, and cannot sue even a stranger for cutting them down, though he might for the trespass to the land, and might recover damages in respect of the shade, shelter, and fruit, for he was entitled to no more; and in such case the lessor may support trespass against the lessee or a stranger if he either fells or damages them.

Thus, being of opinion that the plaintiff is the proper party to sustain this action against the defendant, the next question to be decided is, what is the measure of damages in the present case?

The plaintiff's pleader contends that the damages, as made up in plaint, is the proper measure of damages, and adduced evidence to prove the same; but I am of opinion that, in actions for injuries to land, the measure of damages is the diminished value of the property or of the plaintiff's interest in it, and not the sum which it would take to restore it to its original state. I proposed to the pleader of both parties to send an Ameen to make such enquiries; but, as defendant's pleader expressed his willingness to pay for the lands at the same rate that defendant consented to pay Mr. Smith and Mr. Hills for lands taken up for brick-making purposes, the plaintiff's pleader consented to such proposal, and on consent of both parties the damages have been assessed at 3 rupees.

It appears from the evidence of the only witness, who is a ryot of plaintiff, produced by the plaintiff's pleader to prove the damage as stated in plaint, that, if there was much rain and cultivation all round the lands, subject of action, which there is not, the wastings might fill up the excavated lands in two or three years; but, as it is very contingent whether the deposits will fill up the excavation, I have on consent decreed 3 rupees in plaintiff's favor; but, as defendant is anxious to obtain the opinion of the High Court regarding the matters referred to in the suit, as it is not unlikely that other suits of a similar nature may be brought against him, this judgment is passed contingent on such opinion. Execution not to issue till receipt of the orders of the High Court.

Decree accordingly with costs in 3 rupees —total rupees 5-12-4.

Judgment of the High Court.—We think that the Judge of the Small Cause Court rightly held that the plaintiff's suit was maintainable against the defendant for the injury sustained by reason of the excavation made by the defendant on the plaintiff's land. The amount of damages has been assessed in the case by consent. The rule, as stated by the Judge, for the measure of damages in cases of this nature

may probably be found to be supported by authority; but we are not authorized (the present case not requiring a decision on this point) to lay down any rule for the future guidance of the Judge.

The 19th August 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Limitation—Goods supplied to dealer for retail-sale.

Reference to the High Court by Mr. C. D. Linton, Judge of the Small Cause Court of Chooadanga.

Mothoora Lall Paul, *Plaintiff,*

versus

Shrinebash Dutt and Chunder Mohun Dutt, *Defendants.*

Goods supplied to a dealer for the purpose of retail-sale by him are not "articles sold by retail" within the meaning of Clause 8, Section 1, Act XIV. of 1859.

Case.—THIS is an action brought by the plaintiff to recover from the defendants the sum of rupees 264-10-3, being balance of account for 1268, B. S., for clothes sold and delivered in 1266 and 1267, after giving credit for sums paid by the defendants at different times.

The plaint runs as follows: "That defendants having been cloth shop-keepers, "the second defendant went to my shop at "Santipore, and opened an account with me "in his own name, and took clothes in that "year. That there was a balance of 513 rupees, after giving credit for the payments "made within the year against him, in the "accounts of that year. This balance was "brought forward in the accounts of 1267, "B. S., and for the value of the clothes "taken in that year, inclusive of the previous balance, there was a balance of rupees "367-15 against him after giving credit for "sums paid. That, on the 26th Assin 1267, "both the defendants opened accounts in "their names, and took delivery of clothes "to the extent of rupees 504-1, to which, "adding the balance of the previous year, "the sum due from them was 872 rupees. "Of this amount rupees 588-5-9 have since "been paid, and there was a balance of "rupees 283-10-3 against them at the close "of the year. This balance has been brought "forward in the account of 1268, B. S., of "which 19 rupees have been paid, leaving "still a balance of rupees 264-10-3, which "sum not having been paid by the defendants, though called upon to do so, the "present action has been brought to recover "the same."

Both defendants plead limitation as applicable to plaintiff's claim, as on the face of the plaint it appears that the last payment was made on the 29th Assin of 1268, B. S.; and, more than three years having since elapsed, plaintiff, according to the provisions of Section 1, Clause 8, of Act XIV. of 1859, is out of Court under the Statute of Limitations.

The plaintiff's pleader, on the other hand, contends that six years is applicable to plaintiff's claim, and not three years; and that the claim is consequently not barred by limitation, as it falls within the provisions of Section 1, Clause 16, of Act XIV. of 1859.

It is admitted by second defendant, as also by plaintiff, that to second defendant alone the clothes were sold and delivered, and not to first defendant, whose name second defendant had inserted in the accounts of 1267 without his consent or permission. The plaintiff, therefore, does not wish to proceed against the first defendant, but against the second defendant alone; and second defendant, as also plaintiff, admit that the clothes were sold to second defendant, in order that he may re-sell the same, or deal with it as merchandise, and that, if not re-sold or dealt with as merchandise by him, he was to return the same or such portion thereof as were not sold to plaintiff, and it appears by plaintiff's account books that second defendant returned to him clothes some time in 1267, B. S., and second defendant also admits that he did return clothes to plaintiff.

No evidence has been taken in this case, as it appears on the face of the plaint that, if three years is applicable to plaintiff's claim, he is clearly barred.

As it is admitted that the plaintiff, who is a trader, and that the defendant, who is also a trader, required the clothes, and that they were sold to him for the purpose of being re-sold or dealt with as merchandise, I am of opinion that Clause 16, Section 1 of Act XIV. of 1859, is applicable, and that this is not an action to recover the amount of a tradesman's bill for articles sold by retail to a customer in the ordinary course of business, and therefore does not fall within Clause 8, Section 1 of Act XIV. of 1859; but, as I am doubtful of the opinion I have formed, I solicit the orders of the High Court on this point, previous to entering into the merits of this case.

Judgment of the High Court.—So far as the facts stated enable us to judge of the character of the dealings between the plaintiff and the defendant, the goods sold by the former was not sold by retail. The defendants are themselves apparently sellers by retail, to whom the plaintiff supplies goods for the purpose of carrying on this retail business. Goods remaining unsold by the defendants are, it is said, returned by them to the plaintiff. Whether the defendants are mere agents for sale, or whatever may be their precise character, the goods furnished to them by the plaintiff are not "articles sold by retail" within the meaning of the 8th Clause of the 1st Section of Act XIV. of 1859.

Section 4, Act XXIII. of 1861, applicable to Small Cause Courts—Breach of Contract (Joint or several liability)—Use of Latin expressions prohibited.

No. 2912.

From the Registrar of the Appellate High Court, to the Officiating Judge of the Court of Small Causes of Sealdah and Howrah, dated Calcutta, the 25th August 1865.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Officiating Chief Justice.*

Section 4, Act XXIII. of 1861, as being part of Act VIII. of 1859, is applicable to Small Cause Courts.

Whether the remedy for breach of contract is joint or several, depends upon circumstances according as the contracting parties rendered themselves jointly or severally liable.

In addressing the Court, the use of Latin should be avoided in expressing that which can be equally well expressed in English.

SIR,—WITH reference to your letter No. 281, dated the 12th ultimo, I am directed to forward the accompanying copy of a letter No. 2076, dated the 9th July 1864, from which you will perceive that the Court have ruled that Section 4, Act XXIII. of 1861, as being part of Act VIII. of 1859, is applicable to Courts of Small Causes. The Court are unable to understand the doctrine laid down by you in your judgment in the case, which forms the subject of the present correspondence, *viz.*, that the remedy on contract is only joint, while upon wrong it is joint and several. This would depend upon circumstances: if the contracting parties have rendered themselves liable jointly and severally, the remedy for breach of contract will be either joint or several.

2. The Court have informed Mr. Mendes, the plaintiff in the case, that they cannot directly interfere, but must leave it to you to do whatever seems necessary for the ends of justice, after the perusal by you of the authoritative ruling now forwarded to you and of these remarks.

3. In conclusion, I am to request that you will, when addressing the Court in future, always use the English language, and to observe that it is unnecessary to resort to a learned language, Latin, to express that which can be equally well expressed in English.

No. 2076.

From the Officiating Registrar of the High Court, &c., to the Officiating Judge of the Small Cause Court of Comercoolly, dated the 9th July 1864.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

SIR,—I AM directed to acknowledge the receipt of your letter No. 31, dated the 25th ultimo, and in reply to inform you that the Court are of opinion that it is clear that Act XXIII. of 1861 and Act VIII. of 1859 are to be read together as one Act. Section 4, Act XLII. of 1860, so far as it goes, is similar to Section 5, Act VIII. of 1859, but it confines the jurisdiction to cases in which the defendant dwells, or works for gain within the limits of the Court, and does not allow suits to be entertained upon the ground that the cause of action has arisen within those limits. To that extent the two Sections differ,

2. It appears to the Court that the meaning of the words "except as hereinbefore provided," in Section 21, Act XLII. of 1860, is except in those cases for which a different provision is hereinbefore made. No provision having been made by Section 4, or any other portion of the Small Cause Court Act, for the case of two or more defendants, one of whom dwells within the limits and the other not within them, the Court are of opinion that Section 4, Act XXIII. of 1861, applies with as much force to such a case as to similar cases under Section 5, Act VIII. of 1859.

Rookneekant Chowdhree and others, *versus* Ruttun Bebee and others.

3. The Court authorize you to hear the case marginally noted against all the defendants without further reference, in the event of the defendants, who object to your jurisdiction, not residing more than 20 miles from the boundary of the jurisdiction of your Court. If they do reside beyond that distance, a further reference should be made by you to the High Court, specifying the particular grounds upon which the case, in your opinion, should be tried against all the defendants in your Court.

REFERENCES FROM RECORDER OF MOULMEIN.

The 21st June 1865.

Present:

The Hon'ble *Sir* Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble J. P. Norman, *Judge*.

Bills of Lading (Refusal of Master of Ship to sign, in particular form)—Damages.

Reference, under Section 22, Act XXI. of 1863, to the High Court by the Recorder of Moulmein.

Grasemann and Co.

versus

J. Littlepage.

The refusal of a Master of a ship to sign Bills of Lading otherwise than with an endorsement as to the damage claimed is a wrong that may be fully compensated for in damages.

Case.—THE defendant, being the Master of the Ship *Lord Clyde*, then at Rangoon, executed in his own name a Charter Party of that ship with the plaintiff. The Charter Party provided for 35 lay days, and 10 additional days as demurrage. It also contained the following Clauses: "The owners of the "ship to have an absolute lien on the cargo "for all freight, dead freight, and demur-"rage;" and "The Charterers to have the "privilege of under-letting the whole or "part of the ship, and the Master to sign "Bills of Lading at any rate of freight "required, without prejudice to the Charter "Party."

The ship was laden by the plaintiffs, but disputes arose between them and the defendant as to their liability to twelve days' demurrage which he claimed to be due from them, and he declined to sign any Bills of Lading which were not endorsed with the amount of demurrage which he claimed to be due.

The ship being about to proceed to sea without the defendant having delivered any Bills of Lading to the plaintiffs, they filed the following plaint:—

"Suit to compel defendant to sign and "deliver to the plaintiffs Bills of Lading in "an usual, legal, and customary form for a "cargo of 1,170 tons of teak timber ship-"ped by the plaintiffs on board the defend-"ant's vessel *Lord Clyde* in the months of "February and March last. Suit valued at "3,000 rupees.

"Plaintiffs entered into a Charter Party with "the defendant, dated at Rangoon, the 16th "January 1865, whereby they chartered the "Ship *Lord Clyde* for a voyage from "Moulmein to Bombay with a full and com-"plete cargo of teak timber.

"That, in pursuance of the said Charter "Party, the plaintiffs shipped on board the "said Ship *Lord Clyde* 1,170 tons of teak "timber.

"Plaintiffs, in the usual course of business, "called upon the defendant to sign and "deliver to them the Bills of Lading for the "said cargo of 1,170 tons of teak timber "in an usual, legal, and customary form, but "the defendant has refused, and still refuses, "to sign and deliver to the plaintiffs the said "Bills of Lading, unless he is allowed to "make an endorsement thereon as to certain "demurrage which he alleges to be due, "and which the plaintiffs deny. Where-"fore plaintiffs bring suit and pray that

"summons may issue to the defendant, and "that he be decreed to sign and deliver "to the plaintiffs Bills of Lading in an "usual, legal, and customary form.

"Further, as the defendant has, without "the plaintiffs' knowledge and consent, clear-"ed the said Ship *Lord Clyde* at the Cus-"tom House, and is illegally preparing to "take away the plaintiffs' cargo out of the "jurisdiction, they pray that an injunction "may issue to the defendant restraining him "from such an act, and that an order be "passed to the Master Attendant prohibiting "the said ship from being taken to sea."

The case came on to be heard before the Recorder on the 3rd day of May 1865. It appeared to the Recorder that extremely grave inconvenience might arise from delaying the departure of ships in order to decide questions between some of the shippers and the Master, as to the form or contents of Bills of Lading; that the relief claimed was novel, as he was unable to discover any reported case in which such relief had been granted; that damages would afford a complete and adequate remedy; that it was not a case of the class of which a Court of Equity would have given performance *in specie;* that, though the Indian Courts have the powers of Courts both of law and equity, they are (if no express provision be made to the contrary) bound to apply equitable remedies only when the facts, if cognizable by a Court of Equity, would have, in such a Court, warranted the application of such relief. Sections 200 and 202 of the Code of Civil Procedure were cited as giving an extended power to Courts proceeding under that Code. But these seemed to him only to define the mode of enforcing the execution of a decree for specific performance in the cases where it might lawfully be made, not to extend the cases in which such a decree ought to be made; and he was of opinion that the prayer of the plaint could not be sustained, even on the assumption that the Master's refusal to sign Bills of Lading was wrongful.

The question submitted for the decision of the High Court is, whether the plaint, taken in connection with so much of the Charter Party, as above set forth, discloses facts which, if true, entitle the plaintiffs to a decree to compel the Master to sign Bills of Lading.

Judgment of the High Court.—Assuming that the Master was wrong in refusing to sign Bills of Lading otherwise than with an endorsement as to the demurrage claimed, we think that the wrong was one which might have been fully compensated for in damages. If the owners had wished it, they might have paid the demurrage demanded under protest; or if they had accepted Bills of Lading, and endorsed them under protest, that would not have prevented them from bringing an action for damages. We are not aware of any case in which a Court of Equity has compelled a Master to sign Bills of Lading in a particular form, and we concur with the Recorder in thinking that it would lead to grave inconvenience if suits for such purposes were to be entertained. We, therefore, answer that the plaint, taken in connection with the Charter Party, does not disclose facts which, if true, entitle the plaintiffs to a decree to compel the Master to sign Bills of Lading.

The 21st June 1865.

Present:

The Hon'ble *Sir* Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble J. P. Norman, *Judge.*

Damages—Non-delivery of goods—Lord's-day Act (29 Charles II., c. 7) not applicable to Moulmein.

Reference to the High Court by the Recorder of Moulmein, under Section 22, Act XXI. of 1863.

Grasemann and Co.

versus

Gardner, Brooke, and Co.

The owners of a steamer by their Bill of Lading stipulated that they would not land specie, but that they would deliver it on presentation of Bills of Lading, or carry it on at the Consignee's risk, if delivery were not taken during the steamer's stay in port; and they reserved to themselves the right of carrying on goods, which could not safely be landed within the time stipulated for stoppage, without being liable to indemnity for delay, &c. The steamer arrived in port (Moulmein) late on Saturday evening, and sailed from Moulmein at daybreak on Monday, without delivering the specie shipped by the plaintiff, who now sues for damages. HELD, that the steamer remained in port as long as she was required to do; that the Lord's day, Act 29, Charles II., c. 7, was not applicable to Moulmein, but that even if it was, it could not prevent the owners from availing themselves of the stipulation which they had made; and that no action for damages was maintainable against them.

Case.—THE plaintiffs shipped on board the *Coringa*, a steam ship belonging to the defendants, and bound to Singapore *viâ* Moulmein and Penang, the sum of 27,000 rupees in specie to be delivered to the plaintiffs at Moulmein. The *Coringa* sailed from Moulmein to Singapore without delivering the specie so shipped, and the plaintiffs sued for damages incurred by the consequent delay in delivery and expense of insuring the specie on the voyage to Singapore and back to Moulmein.

The Bill of Lading, under which the goods were shipped, contained the following amongst other conditions: "When owing "to bad weather or other causes the goods "cannot be safely landed at their destination "within the time stipulated for stoppage at "such port in the Company's Mail Contract "with Government, the Company reserves to "itself the right to convey them to the next "port on the voyage, or to the final port of "call, to be returned thence by one of the "Company's steamers having space at the "Company's expense and Merchant's risk; "and the Consignees cannot claim indem-"nity for such delay or the consequences "thereof."

"Specie will not be landed by the Com-"pany. It can only be delivered on pre-"sentation of Bills of Lading on Board, and "will be carried on at Consignee's risk if "delivery is not taken during the steamer's "stay in port."

The voyage of the *Coringa* was not made in pursuance of the Mail Contract with Government, and the terms of that contract did not apply to her voyage. No evidence was given of that contract or its contents, nor was evidence given whether the plaintiff was or was not aware that the *Coringa* was not a contract boat.

The Recorder was of opinion that the defendants were bound to permit the *Coringa* to remain in Moulmein for a reasonable time to enable the Consignees to land the specie, and directed an issue, "whether the steam-"boat, in plaint mentioned, remained at "Moulmein a reasonable time for the dis-"charge of the specie in the plaint men-"tioned."

Upon the evidence it appeared that the *Coringa* arrived at Moulmein on the evening of Saturday, the 31st December 1864, too late to enable the Consignees to take delivery of their specie on that evening before night-fall; and that she started from Moulmein at daybreak on Monday, the 2nd January 1865. Evidence was given that though the Custom House was closed on Sunday, arrangements had been made by the principal Customs Authority in the place to dispense with the forms required by the

Customs Act, and to permit treasure unaccompanied by the usual pass to be landed on Sunday without incurring any penalty under the Customs Act. Evidence was also given that it is not the custom in Moulmein for merchants to attend to business on Sunday, save when a steam-boat is going away; but that, when a steam-boat is going away from Moulmein, it is the practice of merchants there to land treasures on Sunday, and that steam-boats had been running from Moulmein for about eight years. The Recorder came to the conclusion that a merchant could not reasonably be required to take delivery of the specie in the Moulmein river between nightfall and daybreak; and that, as a matter of law, especially having referred to the provisions of the Lord's-Day Act, 29 Charles II., c. 7, a Christian merchant in India cannot reasonably be required to exercise the work of his ordinary calling on Sunday; that, therefore, the *Coringa* had not remained a reasonable time, and that the plaintiffs were entitled to recover.

The Recorder was also of opinion that especially having regard to the aoovementioned provisions in the Bill of Lading, the plaintiffs were entitled to recover the amount paid by them for insurance.

The Recorder, however, on the application of the Advocate for the defendant, respectfully requests the opinion of the Court:—

1st.—Whether the *Coringa* was bound to remain in Moulmein a reasonable time for the delivery of the specie.

2nd.—Whether a Christian merchant in India can reasonably be required to exercise his calling on Sunday.

3rd.—Whether the amount paid by the plaintiffs for insurance can properly be included as part of the damages sustained by them.

Judgment of the High Court.—We think that this is a very clear case. The Company stipulated by their Bill of Lading that "specie will not be landed by the Company. "It can only be delivered on presentation of "the Bills of Lading on board, and will be "carried on at Consignee's risk, if delivery "is not taken during the steamer's stay in "port."

Another condition was as follows: "When "owing to bad weather or other causes, the "goods cannot be safely landed at their destination within the time stipulated for stoppage at such port in the Company's Mail "Contract with Government, the Company "reserves to itself the right to convey them "to the next port on the voyage, or to the "final port of call, to be returned thence by "one of the Company's steamers having "space at the Company's expense and merchant's risk, and the Consignees cannot "claim indemnity for such delay or the consequences thereof."

Under these circumstances, we think that the steamer was at full liberty to proceed, if the owner or his agent pleased, on Sunday. It did not go, however, on Sunday, but it went on Monday morning. The owner of the goods did not send for the goods or land them on Sunday. The Recorder says that he could not be required to do so, with reference to the Act 29 Charles II., c. 7. It appears to us, however, that that statute is not applicable at all to Moulmein. But even if it was, it could not prevent the owners of the ship from availing themselves of the stipulation which they had made. It was proved to have been the ordinary course of business for merchants to land goods at Moulmein on Sunday if there was any necessity for such a course of proceeding. If the plaintiff did not choose to do as others were in the habit of doing, he must bear the consequences.

Therefore, to the *first* question, we reply that the steamer remained in Moulmein as long as she was required to do so. The owners were the judges as to whether they were to remain the whole of Sunday or not. We think the time during which she remained was a reasonable time sufficient to allow of the landing of the specie.

In reply to the *second* question, we say that it is not necessary for us to express any opinion as to whether a Christain merchant can or cannot be compelled to work on Sunday. It was optional with him to do so or not, subject to his having the specie carried on if he did not think fit to do so.

To the *third* question, we reply that, in our opinion, the plaintiff cannot recover any damages against the defendant, as no action was maintainable against him.

REFERENCE FROM RECORDER OF RANGOON.

The 24th April 1865.

Present:

he Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

inors (lawful children of European British subjects)—Custody of—Jurisdiction (of Recorder)—Act IX. of 1861 applicable to Pegu.

eference to the High Court by the Recorder of Rangoon.

In re W. H. Hutton and his wife.

Act IX. of 1861 applies to Pegu, and also to minors, the wful children of European natural-born British subjects. Recorders appointed under Act XXI. of 1863 possess all the isdiction relative to minors referred to in Section 1, Act . of 1861, or intended to be given by that Act.

Case.—In this case a suit has been instituted by William Henry Hutton, and Emelia, s wife, seeking to recover the custody of illian Marie Guthrie, an infant aged 13 ars.

The said infant is the natural and lawful ughter of the female plaintiff by her rmer husband, John William Guthrie. Both e father and mother of the infant were uropeans and British natural-born subcts. The defendant alleges that the stody of the child was committed to her the female plaintiff with the consent of r former husband.

The Recorder of Rangoon is of opinion at, under Act IX. of 1861, he has jurisdicon to determine all questions respecting the future custody of the minor, but the advocates for both plaintiffs and defendant having stated that the question of jurisdiction is one of great general importance, and having requested the said Recorder to submit a statement of the case for the decision of the High Court of Judicature at Fort William in Bengal, the said Recorder respectfully submits the above case for the decision of the High Court, and requests the decision of the said Court.

First.—Whether the said Act IX. of 1861 applies to the Province of Pegu.

Second.—Whether the same Act applies to minors, the lawful children of European natural-born British subjects.

Third.—Whether the Recorders appointed under Act XXI. of 1863 have any and what jurisdiction with respect to the custody of such minors.

Judgment of the High Court.—On reading a case No. 31 of 1865, stated for our opinion by the Recorder of Rangoon, no advocate having appeared before us on either side, we certify our opinion that Act IX. of 1861 applies to the Province of Pegu, and also applies to minors, the lawful children of European natural-born British subjects. And we further certify our opinion that Recorders appointed under Act XXI. of 1863 constitute within their respective districts the principal Civil Court of original jurisdiction which is mentioned in Section 1 of Act IX. of 1861, and possess all the jurisdiction relative to minors which is contemplated and referred to in that Section or intended to be given by that Act.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The 29th March 1865.

Present:

Lord Kingsdown, Lord Justice Knight Bruce, Lord Justice Turner, Sir L. Peel, and Sir J. W. Colvile.

Suit for enhancement—Plea of Mokurruree Title—Production of documents in the Courts of India (attended with danger)—Title-deeds of dependent Talookdars.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Baboo Gopal Lall Tagore

versus

Tilluck Chunder Rai and others.

The objection, that the documents relied on by the defendants in support of their mokurruree title contain no expressions importing the hereditary character of the alleged tenures, was held to be one not open to the plaintiff in a suit for enhancement, where the pleadings admit the existence of the tenure and the lawful occupation of the defendant, and the only question is whether the tenures are held at a variable or at a fixed and invariable rent. Even if the objection were open to the plaintiff, it was held that it could not prevail against the evidence which the record afforded that, for upwards of a century, the talooks in question had been treated as hereditary, and as such had descended from father to son, and been the subject of purchase.

The production of documents in the Courts of India is subject to risk; and of all men, the dependent talookdar has the greatest reason to be careful of his title-deeds, since, whatever may have been the recognition of his title by his existing zemindar, he may, at some future time, have to establish that title by the strictest proof against one coming in by purchase at a sale for arrears of revenue.

The question on this appeal, which has been heard *ex parte*, is upon the alleged right of the appellant, as zemindar of Tuppah Nazirpore, in the zillah of Backergunge, and Province of Bengal, to re-assess and increase the rents payable in respect of certain lands forming part of his zemindary, which formerly constituted one, but were afterwards divided into five dependent talooks.

The appellant derives his title to the larger part of his zemindary from a sale for arrears of Government revenue, which took place in 1819. Fourteen-sixteenths were thus purchased, partly by the appellant's father and a cousin jointly, and partly by one Petumber Mozumdar. All these have since, by descent or sub-purchase, become vested in the appellant. The remaining two-sixteenths are stated to have been acquired, in 1830, by private purchase from a Mr. John Panioty and others, in whom they were then vested.

To enforce his claim to enhance the rents of the five talooks, it was necessary for the appellant to institute five separate suits. The amount involved in each of them was below, whilst the aggregate amount involved in the five exceeded, the sum for which an appeal to Her Majesty in Council lies as of right. The order of the 22nd of February 1860, giving special leave to appeal, provided that, in case the parties in India should consent that the order to be made by Her Majesty in one suit should govern the others, there should be an appeal in one suit only. This consent has, unfortunately, not been given; the proceedings in all the suits have been sent home, and are now before their Lordships. The argument of the learned Counsel for the appellant embraced all the suits, and this judgment must be taken to be given in each of them.

The five suits were commenced in September 1855. Each was founded on the alleged right of the zemindar claiming, in part at least, as purchaser at a sale for arrears of Government revenue, to enhance the rents of a talook described as *tashkisi zimma*, or a sub-tenure, held upon payment of a rent variable according to the current rates of the district.

The title set up by the respondents is to this effect: They allege that, as early as 1704 A. D. (being the year 1111 of the Bengal era), one Mookondo Ram Chuckerbutty took in the name of his son Ram Chuckerbutty an amildaree pottah of the lands in question in the five suits from Syed Shumsuddeen Mahomed, the then zemindar, and held them as one talook; that, on his death, his three sons, the said Ram Chuckerbutty, Gungadhur Shedhanto, and Gopeenath Chuckerbutty, held the talook in thirds, making a separation by guess of part of the land, but holding the other part jointly; and that in 1755 A. D. (or 1162 B.) they made a settlement, witnessed by

the seal of Syed Imamooddeen Mahomed, the descendant of Shumsuddeen, whereby the rent of the waste lands being postponed for future arrangement, they undertook to pay for the remaining and productive land a joint jumma of 1,901 rupees. They further allege that afterwards a complete separation between the brothers took place; that Gungadhur took his share of the lands held jointly, as well as those cultivated by him separately, and formed thereout a separate talook called Sheeb-Kant (a name compounded of the first syllables of the names of his two sons); that Gopeenath made in the same way a separate talook out of his share, which he named "Lukhee Kant," after one of his sons; that the remaining share continued as a third talook in the possession of Ram Chuckerbutty, or of his two sons, Beeshtodeb and Gobind Prosad; and that this division was sanctioned by the zemindar, and the consequent mutation of names effected on the 26th of Bysack 1164 (A. D. 1757), by a writing, under the seal of Syed Imamooddeen, which provided that the jumma or rent should be assessed according to the quantity of land held by each person as ascertained by subsequent measurement. They state, however, that, before this measurement took place, Ram Chuckerbutty's share was sub-divided between his two sons Beeshtodeb and Gobind Prosad, and a further mutation of names effected in 1762; one of these sub-divisions becoming talook Ram Lukhun, the other Beeshtodeb. They further allege that, after this, the contemplated measurement and survey took place; that the talook of Sheeb-Kant Chuckerbutty was then assessed at a fixed mokurruree jumma of 691 rupees 9 annas and 2 cowries; that the talook Lukhee Kant Chuckerbutty was assessed at a like jumma of 643 rupees 15 annas and 13 gundahs; that talook Ram Lukhun Chuckerbutty was in like manner assessed at 335 rupees 6 annas and 9 gundahs; and that of Beeshtodeb, existing under the name of Ram Chuckerbutty, at 337 rupees 6 gundahs; and that accordingly on the 14th Joistee 1174 (being some time in the year 1767) separate *bundobusts*, or settlement-papers, under the seal and signature of the zemindar Syed Imamooddeen Mahomed, were granted to the holders of each talook, and contained these words: "The above amount of jumma being paid in "current coin year by year, no increase shall "be made to it, nor shall you give any."

Thus far the title of the defendants in each of the five suits is common to all. The subject of the first suit is the talook Sheeb-Kant Chuckerbutty; that of the second, Ram-Lukhun Chuckerbutty; that of the third, Lukhee-Kant Chuckerbutty; that of the fourth, Radha-Madhub Chuckerbutty: and that of the fifth, Ramchunder Chuckerbutty; the two last-named talooks having, after the death of Beeshtodeb, been formed out of his talook on a partition and division between his two sons, Radha Kristo and Radha Madhub, in or some time before A. D. 1807. The defendants in the several suits derive their title from the talookdars with whom the settlements of 1767 were made, some by descent, others by purchase; but it is not necessary for the determination of the present appeal to state these devolutions of title in detail.

From what has been said it is obvious that the principal question in each suit was whether the talook, that was the subject of it, had been held from a period considerably anterior to the Decennial Settlement at a fixed or mokurruree jumma, or was held on a rent variable, and therefore subject to enhancement.

The other material issues in each suit were:—

1st. Whether the claim of the plaintiff was barred by the Regulation of Limitation; and,

2ndly. Whether the notice, required by law as a preliminary to a suit for enhancement of rent, had been duly served.

The five suits were heard together by the Principal Sudder Ameen of Zillah Backergunge on the 20th of January 1858. His decision, which is at page 188 of the Appendix, was in favor of the appellant on all points. The defendants in each suit appealed to the Zillah Judge (Mr. Kemp), who, on the 17th of July 1858, reversed the decision of the Principal Sudder Ameen, and decided in favor of the defendants. His judgment, which is at page 215 of the record, proceeded on the ground that the defendants had established by evidence that each talook had paid a fixed and invariable rent for more than twelve years anterior to the Perpetual Settlement, and was consequently not liable to further assessment.

The appellant then carried the five causes to the Sudder Dewanny Adawlut on special appeal, upon the grounds stated at page 218 of the Appendix.

These seemed to have resolved themselves into the objection: *1st*, that the Judge having determined that the suits were barred by the Regulation of Limitation

was in error in afterwards going into the merits of them ; and, *2ndly*, that he was in error in holding that a suit for enhancement of rent must be brought within twelve years from the date at which the plaintiff's title accrued.

The judgment of the Sudder Court, which is at page 223 of the Appendix, dismissed the special appeal on the ground that the Judge had, in fact, decided the suits, not on the question of limitation, but upon their merits, and that his decision, being one of questions of fact, could not be reviewed by that Court on special appeal.

Their Lordships, in dealing with the present appeal, will assume that the appellant's claim is not barred by lapse of time, and that he has duly served the notices required by law. These points appear to have been decided below in his favor, and their Lordships see no ground to doubt the correctness of that decision. They propose, then, to confine their attention to the question whether it was sufficiently proved in the Courts below that the present talook had been held at a fixed and invariable rent for more than twelve years antecedent to the Perpetual Settlement ; it being admitted that, as the law stood in 1858, the burthen of proving this lay on the defendants.

The principal documents on which the defendants rely in support of their title are the settlement of the 21st of Srabun 1162, at p. 177 ; the *Kharijee Likhons*, or " mutation papers," of the 16th and 26th of Bysack 1164, at pp. 51 and 125 ; the similar document of the 13th Joistee 1169, at p. 97 ; the four *Bundobusts*, or settlements of the 11th and 14th Joistee 1174, at pp. 64, 96, 125, and 179 ; the Furud of 1198, at p. 49 ; the petition of 1810, at p. 58 ; the Dakhilas or receipts for rent, at pp. 65 to 68 ; those at pp. 96 to 105 ; those at pp. 126 to 132 ; those at pp. 150 to 158 ; and those at pp. 177 to 185 of the Appendix. The " mutation paper " of Choitro 1214, at p. 149, bears only on the partition in 1807, between the sons of Beeshtodeb, and the titles of the defendants in the 4th and 5th suits.

What then is the effect of the documents, if taken as genuine ? The first establishes the existence of the dependent talook Ram Chuckerbutty in the year 1755 ; the two next prove the division of that talook into three in the year 1757, and the further sub-division of one of these into two in 1765. But all these fail to show that these talooks were held at a fixed and invariable rent. The first is at least consistent with the hypothesis that the rent of the parent talook might vary with the amount of land brought under cultivation ; the others import that the rent of each of the four derivative talooks was not to be settled until after survey and measurement. On the other hand, the four bundobusts or settlement papers of 1174, if genuine, prove that in 1767 A. D. the rent of each of the four talooks became fixed and invariable ; and the dakhilas support the contention of the defendants that they and their predecessors had ever since continued to hold their lands at these rents. The furud shows that in 1792, and the petition shows that in 1810, the zemindar for the time being recognized the bundobusts of 1174, and admitted the title of the defendants. Unless, therefore, this evidence can be successfully impeached, it seems fully to warrant the conclusion of the Zillah Judge that the defendants had relieved themselves of the heavy burthen which the law cast upon them, and established the immunity of their lands from further assessment.

Before, however, considering the objections taken to the genuineness or credibility of the defendant's evidence, their Lordships desire to notice the objection taken by the Attorney-General, to the effect that these documents, if genuine, contain no " words of inheritance " (to use the English phrase), *i. e.*, no expressions importing the hereditary character of the alleged tenures. Their Lordships conceive that this objection, which does not appear to have been taken in the Courts below, is not open to the appellant in these suits. He is not suing for the recovery of the lands, or to disturb the possession of the defendants, in which case he might have been successively met, and no doubt would have been met, by a plea of the Regulation of Limitation. His suits are for the enhancement of rent. The pleadings consequently admit the existence of the tenures, and the lawful occupation of the defendants. The only question between the parties is, whether the talooks are tashkis or mokurruree, *i. e.*, whether they are held at a variable or at a fixed and invariable rent. Moreover, if the objection were open to the appellant, it could hardly prevail against the evidence which the record affords that, for upwards of a century, these talooks have been treated as hereditary, and, as such, have both descended from father to son, and been the subject of purchase. It may further be observed that in the mutation papers of 1807, at p. 149, the talooks of Beeshtodeb are expressly termed "*hereditary*."

What then are the objections to the proof offered by the defendants? The first, and not the least formidable, is that based upon the fact established, if not admitted, that Syed Imamooddeen died 1192 B., or 1785 A. D. This applies directly only to the furud, and to some of the dakhilas. It affects the more material documents (the bundobust of 1174) in so far only as it tends to deprive them of the important corroboration which they derive from the furud, if genuine, and to throw suspicion generally on the defendant's case.

It is clear that the furud bearing the seal and "Sri" signature of Imamooddeen has not been concocted recently, or for the purposes of these suits.

That it existed in 1806, and was filed with other documents in the suit before Mr. Winden (the proceedings in which are at p. 48 of the Appendix) is shown beyond reasonable doubt. It is very unlikely that it should have been fabricated for production in that suit which was one between the talookdars and their sub-tenants. On the other hand, it appears that the Perpetual Settlement of this zemindary, the most important transaction in its history, was concluded several years after Imamooddeen's death in his name, though possibly without the use of his seal. This was six years later than the date of the furud. There is abundant evidence of the appearance of his seal and of his "Sri" signature upon other zemindary documents purporting to bear a date later than that of his death. If such documents have been rejected in some cases, they have been admitted and acted upon in others. Weighing the evidence on both sides, their Lordships are not disposed to dissent from the conclusion of Mr. Kemp, that the date of Imamooddeen's death is not a fatal objection to the genuineness of the furud, and the dakhilas impeached on the same ground; but that all may, nevertheless, be taken to have come from the sherista or office of the zemindar.

It is then objected, as a suspicious circumstance, that, though the furud was produced in 1806, the bundobusts or settlements of 1174, to which it refers, were not then produced. The answer to this is that their production was not necessary for the purposes of that suit. Documents are not produced in the Courts of India without some risk; and of all men the dependent talookdar has the greatest reason to be careful of his title-deeds, since, whatever may have been the recognition of his title by his existing zemindar, he may, at some future time, have to establish that title by the strictest proof against one coming in by purchase at a sale for arrears of revenue.

Another objection taken to the genuineness of the bundobusts of 1174 B. is that no mention of them is made in the copy of the Quinquennial Paper for 1227 B., corresponding with A. D. 1820, which is set forth at page 20 of the Appendix. That there is some foundation for this objection their Lordships do not deny. But the document at page 20 is not very well authenticated. Little, if any, weight seems to have been attached to it even by the Principal Sudder Ameen, whose judgment was in favor of the appellant. The inference founded on the omission to mention certain papers is not conclusive against their existence; and, indeed, there is in the last column of this Quinquennial Return a general reference to papers other than those mentioned in the preceding column. Whatever may be the force of this inference, it seems too slight to out-weigh the corroborative proof of the existence of the bundobusts long before 1820, which is afforded by the furud, and by the zemindar's petition at p. 58 of the Appendix.

The evidence that has been given on either side to prove or to disprove that the enjoyment of the talook has been consistent with the hypothesis that the tenures were mokurruree, remains to be considered. The earlier dakhilas produced (the objection to such of them as are subsequent in date to the death of Imamooddeen having already been disposed of) prove that for upwards of twelve years, prior and up to the Perpetual Settlement, the talooks were held and enjoyed at the fixed rent specified in the several bundobusts. So far, then, the defendants have given the proof which the Regulations require from them. But then it is objected that jumma-wasil-bakee papers produced by the appellant show that at a subsequent period the rents were variable. These papers are at pp. 90 to 95, and pp. 122 to 125 of the Appendix. They are for various years between the year 1203 and 1216, and purport to show the collections in these years made either by the Receiver appointed by the Court of Wards during the minority of the zemindar, or by a lessee named Mozoomdar. They do not mention the talook Sheeb Kant Chuckerbutty, which is the subject of the first suit; and the title of the defendants in that suit is, therefore, unaffected by them. It is perhaps for that

reason that so little notice of them is taken by Mr. Kemp in his judgment. On the other hand, if genuine, they do show that during these years rents higher than those which the defendants contend to be fixed or invariable were demanded and realized in respect of the other talooks, and that those rents were to some degree variable in amount. But all these accounts appear to be of a date earlier than 1810. In that year, it appears from the zemindar's petition at p. 58, the talookdars remonstrated against certain exactions to which they had been subjected, asserted the title which their successors now assert, and obtained a recognition of it from the then zemindar. There is no evidence that since that time the rent paid in respect of any of the talooks has varied; and it is shown that for fourteen years after he had full notice in the proceeding before Mr. Knott, at p. 50 of the Appendix, that the defendant relied on the alleged settlement of 1174, the appellant continued to receive the rents so fixed without seeking to enhance them. The conclusion, therefore, to which their Lordships would come upon the evidence is that, between 1768 and the date of Perpetual Settlement, the enjoyment of these talooks was consistent with the bundobusts of 1174; that it has been equally so since 1810; and that, if higher and varying rents were exacted in respect of any of the talooks during the period covered by the jumma-wasil-bakee papers, such exaction was wrongful, and was remedied in 1810, when the recognition of the zemindar remitted the talookdars to their original rights. This argument assumes the genuineness of the jumma-wasil-bakee papers as to which there may be some doubt. They are certainly inconsistent with the dakhilas for those years produced by the defendants.

On the whole, their Lordships, though laboring under the disadvantage of having heard only the able, but at the same time candid, argument for the appellant, have failed to find any sufficient grounds for disturbing the judgment of the Court below upon a pure issue of fact. The order, therefore, which they must humbly recommend Her Majesty to make, is that this appeal be dismissed.

The 29th March 1865.

Present at the hearing of the first Appeal on the 23rd, 24th, and 26th March 1863:

Lord Kingsdown, Sir J. T. Coleridge, Sir E. Ryan, Sir L. Peel, and Sir J. W. Colvile.

Present at the hearing of the second Appeal on the 1st and 2nd March 1865:

Lord Kingsdown, Lord Justice Knight Bruce, Lord Justice Turner, Sir L. Peel, and Sir J. W. Colvile.

Limitation—Purchaser at sale for arrears of Revenue—Shikmee Talookdars—Onus probandi—Registration—Evidence.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Wise and others

versus

Bhoobun Moyee Debia and another.

A purchased in 1833 a zemindary at a sale for arrears of revenue under Regulation XI. of 1822, and was put into possession of the property. Within the zemindary were certain mouzahs claimed by *B* and *C* as mokurruree-holders of a shikmee talook created by the former zemindar before the Decennial Settlement. Possession of the zemindary was ordered to be delivered to *A*, and his agent was put into possession of the mouzahs as part of the zemindary. After much litigation *B* and *C* were restored to possession of the mouzahs in 1840 and 1841.

To a suit by *A* for the recovery of the lands, *B* and *C* pleaded limitation, calculating the period from the time of purchase in 1833. HELD that the period of limitation must be computed from the time when the possession was taken from the purchaser in 1840 and 1841, and not from 1833.

Lands situate within a zemindary must, *primâ facie*, be considered as part of the zemindary; and it is for those who insist on the separation of lands from the general lands of the zemindary and on their settlement as a shikmee talook, to establish their title.

When a long series of documents is produced, showing a reasonable origin of title, nearly a century ago, a regular deduction of that title, and a possession consistent with it, confirmed by the all-important fact of such possession existing at the time of the commencement of the claimant's title by purchase, the evidence of intrinsic improbability should be very strong indeed which is to counterbalance the weight of such testimony.

The registration of a talook, or of the sunnuds creating it, is not absolutely necessary to prove the creation of the talock before the Decennial Settlement. The omission of any mention of such a talook in the Decennial or Quinquennial Settlement, and the inclusion of the lands in the Decennial Settlement as part of the zemindary for which the jumma is assessed, was held not to afford a strong influence against the evidence of the talook being only a shikmee talook paying rent to the zemindar; the talookdars were not required to mention it, nor was it necessary for the zemindar to do so.

Discussion of the evidence requisite to establish the existence of an old shikmee talook.

In the month of December 1833, a zemindary, called Tuppah Cooreekhuy, in the Collectorate of zillah Mymensing, was put up for sale by public auction, to satisfy arrears of Government revenue under Regulation XI. of 1822.

It was purchased by or on behalf of Bhobany Achargee Chowdry, and it is not disputed that the purchaser acquired whatever rights in the zemindary belonged to the zemindar at the time of the Decennial or Perpetual Settlement. He was entitled to the immediate possession of such lands as at the time of the sale were in possession of the zemindar, and he had a right, under the Revenue Sale Law, to set aside by suit all subtenures created since the Decennial Settlement by the zemindar,* or any of his ancestors.

Within the zemindary were certain mouzahs which, or portions of which, are the subject of the two suits now in appeal. These suits relate to different parts of the same property, are between the same parties, depend on the same evidence, and are substantially one suit.

The mouzahs in question were alleged by persons now represented by the appellants to form a shikmee talook created before the Decennial Settlement, held of the zemindar by mokurruree tenure, *i. e.*, at a fixed rent not liable to alteration.

The purchaser, on the other hand, whose interests are now represented by the respondents, insisted that these mouzahs were part of the zemindary, and were held khas by the zemindar at the time of the sale, and that the purchaser, therefore, became entitled to them. Possession of the zemindary was ordered to be delivered to the purchaser, and his agent was put into possession of the lands in question as part of the zemindary. His possession, however, was disputed on the grounds already stated by the persons claiming as talookdars, who insisted that they were in possession of the lands in that character at the time of the sale. After much litigation, the Sudder Court was of opinion that the talookdars had been in possession at the period in question, and ordered the possession to be restored to them, the purchaser being left to institute a regular suit to set aside such possession.

Under this order the persons claiming as talookdars were put into possession of part of the land in dispute in December 1840, and of the rest early in 1841, as appears by certain dakhulnamahs in evidence in this case.

This decision left the right undetermined, and settled only the question of possession, and it became necessary for the purchaser of the zemindary, if he meant to institute any suit for the recovery of the lands, to institute it within twelve years from the time. But about this time, that is, in the year 1840 or 1841, Chowdry, the purchaser died, leaving a widow, and the widow and the mother of Chowdry became his representatives. The widow, as she alleges, under a will made by her husband, had power to adopt, and adopted a son, and neither the validity of the will nor the fact of adoption is in controversy in this case. She instituted a suit in 1853 for the recovery of this property, which failed upon merely technical grounds for want of sufficient stamp on the proceedings, or for some such reason. In 1855 the first suit now under appeal was commenced. As regards any bar arising from the Statute of Limitations, this suit must be treated as if it had begun in 1853.

The appellants, in their pleadings, insist that the period from which respondents' obligation to sue commenced is to be calculated from the time of the purchase in 1833, and they, therefore, insist on the Regulation for the limitation of actions in bar of the present claim; but they do not, by these pleadings, insist on such bar if the period is to be calculated from the time when the possession was taken from the purchaser in 1840 and 1841: and we are clearly of opinion that this is the period from which the time must be computed The death of the purchaser and the minority of the heir would clearly take the case in that view out of the Statute of Limitations. The rights of the parties, therefore, must be decided on the merits.

The real question, which is one of some difficulty, is whether the lands in question were constituted a talook previously to the Decennial Settlement in 1790-91, by the then zemindar, as alleged by the appellants; or whether they were at that time held khas by the zemindar as part of his zemindary, as alleged by the respondents.

The title set up by the appellants is this: they allege that the lands in question were granted by Ghous Khan, the then zemindar, by two sunnuds, one dated in 1779, and the other dated in 1784, at a fixed rent, to his sister Amina Bebee as talookdar, in mududmash, or for her maintenance at a fixed rent.

* *Qy.* Defaulting zemindar.

If these documents be genuine, there seems to be no reasonable doubt about the appellant's right.

The Judge in the Zillah Court was of opinion that they are genuine, and he therefore dismissed the respondent's suit.

The Sudder Court on appeal was of a different opinion, and made a decree in favor of the respondents.

The first of these suits was heard before us on appeal in February 1863. It appeared that the second suit was coming on for hearing, and we were of opinion that it might be material to see some of the original documents, and also to consider other evidence not at that time before us, and we, therefore, directed that the decision on the first suit should be delayed till the second had been heard, and that the sunnuds relied on by the appellants should be sent over to this country.

Some additional evidence has been printed, and the papers purporting to be the original sunnuds have been sent over, and the question now to be determined is whether, upon the whole, the appellants have sufficiently established their case.

It is not disputed by the appellants that these lands, being situate within the zemindary purchased by the respondents, are *primâ facie* to be considered as part of the zemindary, and it is for them, the appellants, who insist on the separation of these lands from the general lands of the zemindary, and on their settlement as a shikmee talook, to establish their title.

To prove their case, they produce papers purporting to be the two sunnuds to which we have already referred.

Nothing has been pointed out to us in the appearance of these papers throwing any suspicion upon them, nor have we been able to discover anything which does so.

We have three deeds of sale, by Amina Bebee, and persons purchasing from her, professing to convey different portions of the lands as parts of a talook. One of these deeds is dated in 1808, and another in 1821.

There are produced two other sunnuds, one purporting to be dated in 1812, by Asheena Beebee, the then zemindar, to Aymun Beebee (a purchaser from Amina), and another in 1815 by Ibrahim Khan, the then zemindar, to Khosh Khuddum, a purchaser of a part of this talook from Aymun Beebee. These sunnuds purport to recognize and confirm the title of the purchasers.

In proof that Amina Beebee had possession of these lands as a talook, in conformity with the sunnuds granted, we have *chittahs* or measurement papers, signed by Ameens employed on behalf of the zemindar, to measure the lands of the zemindary in the years 1787, 1788, 1789, 1790, 1791, and 1792. These chittahs describe the lands as the talook of Amina Beebee.

We have further the detailed accounts of the agent in receipt of the rents of these lands in the year 1790, describing them as the talook of Amina Beebee.

There are other measurement papers or chittahs affording the same evidence in the years 1807 and 1816.

There are then produced dakhilas or receipts for rent on behalf of the zemindar for the talook of Amina Beebee in the years 1780, 1805, 1817, 1820, and 1828.

Several other documents are in evidence showing, if they be genuine, the same fact that, at an early date and before the Decennial Settlement, a shikmee talook had been constituted in favor of Amina Beebee at a mokurruree jumma; and that the lands included in it were held by her, or persons claiming under her, up to the time or nearly up to the time of the sale of the zemindary in 1833.

It was established by the order of the Court, restoring the appellants to the lands in the year 1840, that they were in possession of them at the time of the sale: for the order was made entirely upon that ground, and decided nothing as to the title.

Against this great body of evidence there is really nothing which can be called evidence on the part of the respondents; but they allege, and undertake to shew, that all the documents relied on by the appellants are forgeries.

A long experience in Indian Appeals has, no doubt, satisfied us that the presumption in favor of the genuineness of documents offered in evidence in that country is very weak; but still it must not be held that the presumption is in favor of forgery; and when a long series of documents is produced, showing a reasonable origin of title nearly a century ago a regular deduction of that title, and a possession consistent with it confirmed by the all-important fact of such possession existing at the time of the commencement of the respondents' title by purchase in 1833, the evidence of intrinsic improbability should be very strong indeed, which is to counterbalance the weight of such testimony.

Still, circumstances may be sufficiently strong for this purpose, and they have been

held to be so in this case by the Judges of the Sudder.

We will remark upon the principal of these circumstances; but it is material to consider them with reference to the case set up by the respondents.

The case set up by him is shortly and accurately stated in the judgment of the Sudder Court in these terms:—

"The general allegation of the plaintiff is that Ibrahim Khan, the proprietor of the zemindary, up to the time of the revenue sale, fraudulently set up this talook for his own benefit, for which purpose he has found it convenient to use the names of his relations and connections; Aymun Beebee (one of the alleged purchasers from Amina) being his wife, and Amina Beebee, the professed talookdar of the sunnuds of 1186 (1779) and 1191 (1784), being his aunt and the sister of the then zemindar Ghous Khan."

If this case be true, no doubt the sunnuds purporting to create this talook half a century before the sale, and the various documents long before the sale referring to it, must be forgeries. On the other hand, if these documents be genuine, then the respondents' case must be untrue.

No direct evidence is offered against the genuineness of the sunnuds; but it is said that they cannot have been made at the time when they bear date, for several reasons, of which these are the principal:—

First, it is said that the talook is not mentioned in the Decennial or Quinquennial Settlement as such, and that the lands are included in the Decennial Settlement as part of the zemindary for which the jumma is assessed on the zemindar.

We have not before us the particulars of these Settlements; but, assuming the statements to be accurate, the fact does not seem to afford any strong inference against the existence of the talook.

If it had been an independent talook, it would have been liable to direct assessment by the Government, and would have been the subject of assessment on the talookdar: but, being only a shikmee talook paying rent to the zemindar, the talookdars were not required to mention it, nor was it necessary for the zemindar to do so.

It is then said that, if the sunnuds and the various instruments by which conveyances of portions of the talook are alleged to have been subsequently made had been really executed, those instruments, or, at all events, some of them, would have been registered, and that none of them have, in fact, been registered.

No Regulations have been pointed out to us by which the registration of these sunnuds or of this talook (created, if at all, before the Decennial Settlement) was made necessary; and though the observations of the Judges of the Sudder, "that the deeds want the authentication which registration would have afforded," and "that the talook wants the corroboration which registration and its mention in the Quinquennial papers would have afforded," be perfectly well founded and entitled to weight, it must be considered whether, without this evidence, the proof be not sufficient.

A circumstance more strongly relied on by the respondents' Counsel was this, that these sunnuds were never produced nor mentioned by the appellants on several occasions on which, it is said, if they had really been in existence at that time, they ought to have been produced, and certainly would have been produced.

First, it is said that a litigation went on from the time of the sale in 1833 up to the year 1840 with respect to the possession of these lands, and that in the course of that suit no allusion was made to these documents. But the answer given to this objection much diminishes its force, *viz.*, that the question then before the Court was not one of title but of possession, and that it was only on the question of title, as to which the Court had no power in that suit to pronounce any decision, that the production of the original sunnuds was of importance. Though these sunnuds were not produced, the title under them was asserted, and the sunnud of confirmation of 1813, from Asheena Beebee to Aymun Beebee, seems to have been actually produced on the 2nd of July 1839.

Another objection which was much pressed at our bar was this:—

These sunnuds describe the lands as lakheraj and muddudmash, whereas it is said that they were not alleged to be lakheraj at the time of the Decennial Settlement, but were included in the lands subject to assessment; and that it was not till a much later period (not very long before the sale) that they were claimed to be lakheraj, and that these instruments must, therefore, have been fabricated after that claim had been set up.

Now, the force of this argument depends on the allegation that these lands were not claimed or pretended by the then zemindar

to be lakheraj before the settlement. But of this we find no sufficient evidence. It is well known that before that time, and especially about that time, a great number of fictitious claims to exemption from assessment of lands as lakheraj were set up by different proprietors, and, although it was held in what is called the alluvion suit that the lands were not, in fact, lakheraj, and that the firman of the Sultan purporting to make them so had been forged by Ibrahim Khan, yet that fact by no means shows that at the dates of the sunnuds the then zemindar did not claim or pretend them to be so. Whether they were not included in the assessment was a question depending on the description contained in the Decennial Settlement; and, though the Government Officer was satisfied after much enquiry that they were in fact covered by the assessment, such descriptions are generally vague and uncertain, and the difficulty of identifying lands is greatly increased in a long lapse of years when it appears that the lands adjoin the great river Burhampooter, and are subject to be submerged, and have their boundaries changed by not unfrequent overflows or changes in the course of the stream.

The last objection which we think it necessary to notice, and to which we confess we are inclined to attribute the most weight, is that in 1836 Mr. Glass, the partner, as we understand it, with Mr. Wise, one of the present appellants, insisted upon a title to a portion of these lands under a lease alleged to have been granted to him by Ibrahim Khan, the late zemindar, whereas Mr. Wise now claims under a purchase subsequently made by him and Glass from Aymun Beebee in 1840, and insists that Ibrahim Khan was never in possession of the lands, and that they were not part of the zemindary, except as being part of a dependent talook.

Undoubtedly these two titles are inconsistent; but it is not impossible that Mr. Glass might first procure a lease from Ibrahim, supposing him to be the owner, and might afterwards, when the title of the talookdars was insisted on and seemed likely to succeed, make a purchase from them in order that they might, under any circumstances, be secure in the enjoyment of his Indigo plantations.

The probability of this being so is strengthened by the statement in the petition of Glass to the Sudder Court in 1838, in which he alleges "that he had from a long time been making Indigo cultivation on the lands after making ijara pottahs of them from the proprietors, *i. e.*, talookdars and zemindars."

We are very far from thinking that the various objections thus made to the title of the talookdars, and so ably urged at our Bar, are without force. But against them we must set the evidence produced by the appellants in confirmation of their title.

Now, any evidence which proves the existence of this talook at a period antecedent to that at which the respondents allege it to have been fasely set by Ibrahim Khan, tends, more or less strongly, to disprove his case. The appellants' evidence upon that point seems to us very strong.

In 1819 there is a proceeding in the Appeal Court of Jehangur Nuggur, in which the question was, whether certain lands belonged to this talook, or were part of the khas lands of the zemindar.

In 1824 we have a petition from a person complaining that Khosh Khuddum had agreed to sell to him a portion of his talook, but had refused to perform his contract.

In 1833 we find an order made in a suit which had been instituted in 1831 by Aymun Beebee against her husband Ibrahim Khan, by which a part of the lands of this talook was ordered to be sold to satisfy fees due to the pleaders.

In 1843 we find it stated upon the result of an enquiry, then directed by the Civil Court of Mymensing, that, when the talook was about to be sold, the plaintiff's mooktear deposited in the Treasury of the Collectorate the sum demanded.

These proceedings are very important, not only because they show that in 1833 a portion of this talook was dealt with by the Court as the property of Aymun Beebee, but because it makes the supposed collusion between Ibrahim Khan and his wife Aymun, which is essential to the respondents' case, in the highest degree improbable.

That the sunnuds in question have not been fabricated since the institution of these suits, is clear from the proceedings in the suits with the Government as to the alluvion lands, which are of great importance.

It appears that some time before 1843 a tract of land which had been covered by the waters of the Burhampooter was left dry by some change in the stream. This tract was within the limits of Cooreekhuy. If these were new derelict lands, they would

on, payable by Shama Purshad Nundy, under the decree of the 27th July 1829, and the compromise of the 16th May 1831; and that the case ought to be referred back to the Court of Sudder Dewanny Adawlut, to ascertain, carry out, and enforce the rights and liabilities of the parties as above declared; and that Tara Purshad should be at liberty to apply in the cause of Doorga Purshad against Shama Purshad Nundy for leave to enforce the decree in that cause as he might be advised for the recovery of his 6-anna share of the said 24,217 rupees 12 annas 17 gundahs, and interest in so far as the same had not been already recovered. By an order of Her Majesty in Council, bearing date the 18th July 1849, this report was proved, and it was ordered that the decree of the Sudder Court of the 15th April 1841 should be, and the same was thereby reversed, and that it be declared and done as in the report more fully set forth and recommended; and that the same be duly and punctually obeyed, complied with, and carried into execution.

In the meantime, pending this appeal to Her Majesty, and on the 3rd December 1842, Tara Purshad instituted a further suit against Doorga Purshad to recover the sum of 4,593 rupees 12 annas 9 pie, the interest upon his 6-anna share of the sum secured by the bond from the year 1821, when the proceedings against Shama Purshad Nundy were commenced, up to the 27th of July 1829, when the decree against him was made, being the interest for which, by the plaint in his original suit, he had reserved to himself the right to sue. This suit was heard before the Principal Sudder Ameen on the 11th of August 1843, and by his decree of that date he dismissed the suit; but, upon an appeal by Tara Purshad to the Judge of the Zillah Court, the decision of the Sudder Ameen was reversed, and Doorga Purshad was ordered to pay to the respondent the 4,593 rupees 12 annas 9 pie, with interest at 12 per cent. per annum, from the time of the commencement of the suit, and with the costs in both Courts; and upon a special appeal by Doorga Purshad to the Court of Sudder Dewanny Adawlut, that Court dismissed the appeal with costs. In consequence of these decrees, Doorga Purshad was compelled to pay to Tara Purshad the sum of 11,127 rupees 15 annas 3 pie, which he accordingly paid as follows: 8,200 rupees 7 annas 3 pie on the 28th April 1848, and 2,927 rupees 8 annas on the 4th August 1857.

Several attempts appear to have been made by Doorga Purshad, after Her Majesty's order in Council arrived in India, to obtain a review of the decrees made against him in the last-mentioned suit, and to have those decrees considered in connection with Her Majesty's order in Council, but failed in these attempts; and thereupon, on the 17th of August 1857, he instituted against Tara Purshad the suit out of which the appeal before us has arisen. By his plaint in this suit he has sought to recover the sum of 23,294 rupees 9 annas 16½ gundahs, being the amount of the sums paid by him to Tara Purshad, and of the sums which he has paid for his own costs of the proceedings taken against him, with interest on such sums respectively from the respective times of the payment thereof at 12 per cent. per annum. Tara Purshad, by his answer to the plaint, has insisted that the decision of the Judge of the Zillah Court in his favor in the further suit brought by him having been affirmed on appeal by the Sudder Court, became final and could not be set aside by a new suit, and he has relied upon Section 16 of Regulation III. of 1793 as a bar to the suit. On the 29th June 1858, the case was heard before the Principal Sudder Ameen, and was by that Officer dismissed with costs. From this decision Doorga Purshad appealed to the Sudder Court: but that Court, by its decree dated the 9th May 1859, affirmed the decision of the Principal Sudder Ameen. The appeal now before us is from the decree of the Sudder Court of the 9th May 1859, and from the decree of the Zillah Court of the 29th June 1858. There is no appeal before us from either of the decrees made in the further suit instituted by Tara Purshad against Doorga Purshad, their Lordships having, in consequence of delay on the part of Doorga Purshad, refused an application made by him for leave to appeal from those decrees. Doorga Purshad and Tara Purshad have both died pending this appeal, and the appeal has been revived, and is now in force between their representatives.

The sole question to be considered upon this appeal is, whether Doorga Purshad was entitled to recover in the suit instituted by him against Tara Purshad, the sums which had been recovered by Tara Purshad from him under the decree in the suit which Tara Purshad had instituted against him; and in considering this question, it must be assumed that, at the times when those decrees were made, Tara Purshad was rightfully

entitled to recover the sums which were payable under them, there not being, as has been mentioned, any appeal from those decrees. Tara Purshad insisted in the Courts in India, and his representatives have insisted in the argument before us, that Doorga Purshad was not entitled to recover these sums for two reasons: *first*, that his right to recover them is precluded by Section 16 of Regulation III. of 1793; and, *secondly*, that, independently of that provision in the Regulations, money, which has been paid under a decree or judgment of a Court of competent jurisdiction, cannot be recovered in a new suit or action so long as the decree or judgment under which it has been recovered is subsisting and in force. Upon the first of these points, their Lordships have felt but little doubt. Section 16 of Regulation III. of 1793 is in these terms: "The Zillah and City Courts are prohibited from entertaining any cause which, from the production of a former decree or the records of the Court, shall appear to have been heard and determined by any former Judge or any Superintendent of a Court having competent jurisdiction. If any doubt should arise respecting the competency of the former jurisdiction, the Judges are to report the circumstances to the Sudder Dewanny Adawlut, and wait the instructions of that Court." Their Lordships think that this provision applies only to cases in which the question to be determined in the cause is the same question as has been already heard and determined, and not to cases like the present, in which new circumstances have intervened, and altered the nature and character of the question to be determined. The intent of the Regulation, as it seems to their Lordships, is only to prevent the re-trial of the same question, and it is obvious that there is an essential difference between the question, whether Tara Purshad was entitled to recover against Doorga Purshad before the order of Her Majesty in Council was pronounced, and the question whether, after that order was pronounced, he was entitled to hold the money which he had previously recovered.

Upon the second point their Lordships have felt more difficulty. There is no doubt that, according to the law of this country—and their Lordships see no reason for holding that it is otherwise in India—money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force; but this rule of law rests, as their Lordships apprehend, upon this ground, that the original decree or judgment must be taken to be subsisting and valid, until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded, and, as their Lordships conceive, is recoverable either by summary process or by a new suit or action. The true question, therefore, in such cases is, whether the decree or judgment, under which the money was originally recovered, has been reversed or superseded; and, applying this test to the present case, their Lordships are of opinion that the decrees obtained by Tara Purshad against Doorga Purshad were superseded by the order of Her Majesty in Council pronounced in the year 1849. It was plainly intended by that order that all the rights and liabilities of the parties should be dealt with under it, and it would be in contravention of the order to permit the decrees obtained by Tara Purshad, pending the appeal on which it was made, to interfere with this purpose. Moreover, the decrees now under appeal rest on precisely the same cause of suit as the original decree, which was reversed by the order of Her Majesty in Council. The plaint in the case on which the original decree was recovered describes the interest recovered by the decrees under appeal as part of the same cause of suit, separated only for the convenience of Tara Purshad; and the decrees under appeal, therefore, were mere subordinate and dependent decrees, and their Lordships do not think that these decrees can be held to have remained in force when the decree on which they were dependent had been reversed.

That the Court of Sudder Dewanny Adawlut has not, as their Lordships think it might have done, dealt with the decrees now under appeal, as falling within the direction given to that Court by Her Majesty's order in Council, to ascertain, carry out, and enforce the rights and liabilities of the parties, does not, in their Lordships' opinion, vary the case. This provision in Her Majesty's order in Council gave power to the Court of Sudder Dewanny Adawlut to deal summarily with the rights and liabilities of the parties, but it could not, in their Lordships' opinion, take away any rights which the law would give to Doorga Purshad independently of that power. For these reasons their Lordships are of opinion that the decrees appealed from ought to be reversed, and that the

sums of rupees 8,200-7-3, and rupees 2,927-8 paid under them ought, so far as the assets of Tara Purshad will extend, to be re-paid by the now respondents to the appellant, with interest at 12 per cent. from the respective times when such sums were respectively paid; and that the now respondents ought also, so far as Tara Purshad's assets will extend, to pay the costs of this appeal; but under the circumstances of the case, and having regard to the delay on the part of Doorga Purshad, their Lordships do not think that his representatives are entitled to recover the costs incurred by him in the course of the proceedings taken against him by Tara Purshad. Their Lordships, therefore, will humbly recommend Her Majesty to make an order upon this appeal to the effect which we have mentioned.

The 15th June 1860.

Present:

Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

Leave to appeal to Privy Council how to be regulated.

On three petitions for leave to appeal in the following suits from judgments of the Sudder Dewanny Adawlut at Calcutta.

Maharajah Suteeschunder Roy

versus

Gunneschunder and others.

Ranee Surnomoyee

versus

Maharajah Suteeschunder Roy.

Gooroopershad Khoond

versus

Juggutchunder and another.

Leave to appeal to the Privy Council is to be given in cases where the petition is presented within the prescribed period, and the value of the matter in dispute in the appeal amounts to 10,000 rupees, including interest *up to* the decree.

The grant of leave to appeal in cases where the specified amount of 10,000 rupees can only be reached by the addition of interest *subsequent* to the decree is in the discretion of the Privy Council.

THE question in each of these three cases is, whether leave should be given to appeal to Her Majesty in Council. In one of the cases, application, as their Lordships understand, has been made to the Sudder Court for leave so to appeal, and the application has been refused: but in the two other cases no such application has been made.

Mr. Leith.—Will your Lordships excuse me? I should not wish to mislead your Lordships: it was not an application for leave to appeal to Her Majesty in Council, but an application to the Sudder, praying for the admission of a special appeal.

Lord Justice Turner.—Then in none of the cases has there been any application to the Sudder Court for leave to appeal to Her Majesty. The reason of there having been no such application to the Sudder Court in two, at least, of the cases is stated to have been that the Sudder Court has proceeded upon a certain rule as to cases in which leave should be given to appeal; and that, according to the rules on which they have proceeded, leave would not have been given in those two particular cases.

It is not very clear to their Lordships on what particular grounds the Sudder Court has proceeded with reference to giving or refusing leave to appeal. But their Lordships feel no doubt upon what grounds the Sudder Court ought to proceed in such cases. It is quite clear, in their Lordships' judgment, that the matter must be regulated by the order in Council of the 10th of April 1838, and by that order the Sudder Court are not to give leave to appeal unless the petition be presented within the time limited in the order, and unless the value of the matter in dispute in such appeal shall amount to the sum of 10,000 rupees at least, importing, therefore, that the leave to appeal is to be given in cases where the petition is presented within the prescribed period, and the value of the matter in dispute in the appeal amounts to the specified sum of 10,000 rupees.

Now, where the appeal is from the whole decree, and the decree has given an amount then actually including interest up to the decree exceeding 10,000 rupees, it is clear that the matter which is in dispute in the appeal must exceed the sum of 10,000 rupees: for the question to be tried upon the appeal must be, whether the decree is or is not right, that is to say, whether the decree has or has not properly ordered payment of a sum exceeding 10,000 rupees. Where, therefore, at the date of the judgment, the sum which is recoverable under the decree of the Sudder Court is an amount exceeding 10,000 rupees, there, in their Lordships' judgment, the case must clearly fall within the terms of the order in Council.

That, in their Lordships' understanding, disposes of the first and third of these cases.

The second case is somewhat different in its circumstances. It appears to be a case in which the party, applying for leave to appeal, claims to be entitled to an estate subject only to the payment of a fixed annual rent of 64 rupees; but the plaintiff in the suit, who is in possession of the judgment of the Court below, and would be the respondent upon the appeal, claims the right to set upon the estate any rent which he may think fit. In this case it appears to their Lordships, either that the value in dispute in the appeal must be considered to be 10,000 rupees within the meaning of the order, or, if not, that it must be within the discretion of their Lordships whether leave to appeal should or should not be given. Taking the case to be within the meaning of the order, it is clear that the value of the matter in dispute will exceed the sum of 10,000 rupees; for, of course, an estate held at a rent of 64 rupees must be diminished in value to an amount far exceeding 10,000 rupees, if it be chargeable with a rent of 822 rupees, the amount of rent given by the decree. Their Lordships, however, do not think it necessary to decide whether the case falls within the meaning of the order or not. They think that, whether it falls within the order or within their discretion, the leave to appeal ought to be given.

Their Lordships have thus stated the reasons on which they have proceeded in these three cases, because they consider it of importance that the Sudder Court should understand the rules which ought to be proceeded on in giving leave to appeal, as a contrary practice on their part drives parties into this Court to obtain the leave. They desire, therefore, that the rules which have been mentioned should be observed, and are of opinion that in all these three cases leave should be given to appeal, and that in each case security should be given to the amount of 300*l.* Their Lordships must not, of course, be understood to intimate that the Sudder Court ought to give the leave to appeal in cases in which the specified amount of 10,000 rupees can only be reached by the addition of interest subsequent to the decree.

Such cases must, in their Lordships' opinion, rest in their discretion.

The 26th May 1865.

Present:

Lord Kingsdown, Lord Justice Knight Bruce, Lord Justice Turner, Sir L. Peel, and Sir J. W. Colvile.

Hindoo Law—Power of testamentary disposition—English Law (not applicable)—Wills—Adoption—Inheritance.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Bhoobun Moye Debia

versus

Ram Kishore Acharjee.

The testamentary power of disposition by Hindoos has been established in Bengal by the decision of Courts of Justice. The nature and extent of such power cannot be governed by any analogy to the law of England—the English system being one of the most artificial character, founded in a great degree on feudal rules, regulated by Acts of Parliament, and adjusted by a long course of judicial determinations to the wants of state of a society differing, as far as possible, from that which prevails amongst Hindoos in India.

A written instrument, purporting to be a deed of permission to adopt, which was registered as a deed in the life-time of the maker, and which contained no words of devise, was held not to be of a testamentary character, there appearing no intention on the part of the maker that the document should contain any disposition of his estate except so far as such disposition might result from the adoption of a son under it.

An adopted son, as such, takes by inheritance, and not by devise.

A son cannot be adopted to the great grandfather of the last taker after the lapse of several successive years when all the spiritual purposes of a son, according to the largest construction of them, would have been satisfied.

When the estate of a son is unlimited, and that son marries and leaves a widow his heir, she acquires a vested interest in her husband's property as widow, and a new heir cannot be substituted by adoption to defeat that estate, and take as an adopted son what a natural-born son would not have taken.

By the mere gift of power of adoption to a widow, the estate of the heir of a deceased son vested in possession cannot be defeated and divested.

The rule of Hindoo Law is that, in the case of inheritance, the person to succeed must be the heir of the last full owner. On the death of the last full owner, his wife succeeds as his heir to a widow's estate; and, on her death, the person to succeed is the heir at that time of the last full owner.

The appeal in this case arises out of a suit brought by the respondent, Ram Kishore, to recover certain estates in Bengal, which were claimed by, and were in the possession of, the appellant and of Rajendro Kishore, whom she alleged to be her adopted son.

The facts, so far as they are necessary to make our judgment intelligible, are these:—

Gour Kishore Acharjee, being the owner of considerable estates in Bengal, died in the year 1821. He left surviving him a widow named Chundrabully, and an only son named Bhowanny Kishore.

At the time of his father's death, Bhowanny, who succeeded as his heir, was about four years of age. He attained, however, his majority, and married the appellant, Bhoobun Debia. He died in the month of August 1840, being then about twenty-four years old. He left no issue, and Bhoobun Debia, his widow, became the heir of his property, as well ancestral as of other estates, which had been purchased with his own money during his life.

Immediately upon the death of Bhowanny, an instrument was set up as being his will by Chundrabully his mother, and Bhoobun Debia his widow. By this instrument power to adopt a son was given to Bhoobun Debia, and until such adoption was made, the income of the estates was given to Chundrabully and Bhoobun Debia.

Under this alleged will these two ladies took possession of the estates of Bhowanny, and remained in the enjoyment of them for nearly four years.

In December 1843, Bhoobun Debia professed to exercise the power alleged to have been given to her by the instrument already referred to, and adopted a boy called Rajendro Kishore.

Upon this a quarrel appears to have arisen between Chundrabully and Bhoobun, and Chundrabully alleged that the supposed will of Bhowanny, under which she had so long been in the enjoyment of half his property, was a forgery, and had not been made till after his death; and that Bhoobun had no power of adoption. She further set up an instrument called an *onoomutlee puttro*, or deed of permission, by which she alleged that a power to adopt a son had been given to her by her husband Gour Kishore in his life-time, and which power, in the events which had happened, she claimed a right to exercise.

She accordingly adopted, or professed to adopt, the appellant Ram Kishore, as the son of Gour, her late husband.

Bhoobun Debia, on behalf of Rajendro Kishore, her adopted son, having obtained possession of all the property of Bhowanny, the suit in which the present appeal is brought was instituted in 1852, in the Zillah Court of Mymensing, by a next friend of Ram Kishore, on his behalf, against Bhoobun Debia and Rajendra Kishore and certain other persons, the plaintiff claiming as the adopted son of Gour, the whole property, ancestral and acquired, of Bhowanny. To this suit Chundrabully was made a defendant, instead of suing as a plaintiff on behalf of her son; that course being adopted probably with a view to avoid any prejudice which might arise from the inconsistency of her previous conduct with the title now set up for her son.

When the case came before the Sudder Ameen, he was of opinion that the plaintiff must recover upon the strength of his own title, and that, if such title failed, it was unnecessary to decide upon the case of the defendants.

He was of opinion that the plaintiff had failed to prove his title, and he, therefore, dismissed the suit, expressing at the same time a strong opinion in favor of the defendant's adoption.

He awarded the costs of the suit to the defendants, with the exception of Chundrabully, whom he held to be really the promoter of the suit.

From this decision there was an appeal to the Sudder Dewanny of Calcutta. The case was heard upon several different occasions. Finally, the Judges were unanimously of opinion that the adoption of Rajendro was invalid, and that the will of Bhowanny, purporting to create the power of adoption, was a forgery. They were equally unanimous in holding that the *onoomutlee puttro* of Gour Kishore was a genuine and valid instrument, and that, if the power to adopt continued at the time when Chundrabully professed to execute it, there had been a valid adoption. One of the Judges was of opinion that the power was gone, and that the adoption was invalid. The other two were of opinion that the power existed at the time of the adoption, and a decree was made, therefore, in favor of the plaintiff as to the ancestral property of Bhowanny, but not as to his self-acquired property; and the costs of the parties were ordered "to be borne by them in proportion to the amount of the property decreed or dismissed."

The case now comes before us on appeal by Bhoobun Debia, as representing her own rights and the rights of a son, whom she had adopted in lieu of Rajendro who is dead, and on a cross-appeal by Ram Kishore, complaining that the decree in his favor ought to have included the self-acquired property as well as the ancestral property of Bhowanny.

On the hearing of these appeals we expressed a clear opinion, without calling on the respondent's Counsel that the Court below

was right in holding that the alleged will of Bhowanny was a forgery. The evidence is irresistible that it was contrived by the different members of his family after his death, in order to give effect to an arrangement which they consider would be for the common benefit. This being so, and no power of adoption having been proved or alleged to have been given by parol, the adoption of Rajendro and of the son now substituted for him must, of course, be held in this suit to be invalid.

The next question is as to the validity of the adoption of Ram Kishore. We see no reason to dissent from the opinion of the Court below upon the facts of the case, *viz.*, that the *onoomuttee puttro* of Gour is a genuine instrument, and that, supposing the power given by it to have been in force when the adoption under it took place, the adoption was good; but we think it unnecessary to examine into the genuineness of this instrument, as we are of opinion that, at the time when Chundrabully professed to exercise it, the power was incapable of execution.

It will be necessary to go into this part of the case with some minuteness.

It appears that some years before the birth of Bhowanny, and in the year 1811 of our Era, Gour Kishore being then childless, and anxious, as Hindoos generally are, to provide a son by adoption if he should have no natural-born son, executed an *onoomuttee puttro* on the 30th March 1811, by which he gave power of adoption to Chundrabully, his wife.

In 1819, two years after the birth of Bhowanny, he executed the instrument on which the present question depends, which is found at page 51 of the Appendix, and is in these words:—

"Gour Kishore Surma,

"By the pen of Ram Nursing Surma.

"To the abode of all goodness, Chundrabully Dabea.

"This is an *onoomuttee puttro* (deed of permission) to the following purport: Prior to the birth of a male child from your womb, I had executed in your favor an *onoomuttee puttro* on the subject of your receiving (an) adopted son. Subsequently, by the will of God, you have given birth to a male child. Still, having regard to the future, I have again given you permission. If, which God forbid, the male child of your body be non-existent, then you will adopt a son from my race (*gotra*), or from a different race (*gotra*), for the purpose of performing mine and your *sradh* and other rites, and for the *sheba* (service) of the gods, and for the succession to the zemindary and other property; on which, if the adopted son be non-existent, which god forbid, then you shall, according to your pleasure, on the failure of one, adopt other sons in succession, to avoid the extinction of the *pinda* (funeral cake or offering); that *dattaka* (adopted) son shall be entitled to perform your and my *sradh*, &c., and that of our ancestors, and also to succeed to the property. To this end I execute this *onoomuttee puttro.* Dated 25th Kartick 1226, B. E."

The first question which arises is as to the construction of the instrument. It seems to have been considered by the two Judges of the Sudder Court, who decided in favor of the respondent (certainly by one of them), that the document was to be regarded as a will, and as containing a limitation on failure of male issue of the testator in the life-time of Chundrabully, of the estate of the testator to a son to be adopted by Chundrabully as a *persona designata;* and one of the Judges, in a very elaborate argument, refers to Mr. Fearne's celebrated treatise on Contingent Remainders, in order to show that such a devise by the English Law would be valid. There is no doubt that, by the decision of Courts of Justice, the testamentary power of disposition by Hindoos has been established within the Presidency of Bengal; but it would be to apply a very false and mischievous principle if it were held that the nature and extent of such power can be governed by any analogy to the Law of England. Our system is one of the most artificial character, founded in a great degree on feudal rules, regulated by Acts of Parliament, and adjusted by a long course of judicial determinations to the wants of state of a society differing, as far as possible, from that which prevails amongst Hindoos in India.

But their Lordships are quite satisfied that there is in this case no room for the application of any such doctrines. The instrument before us is merely what it purports to be—a deed of permission to adopt; it is not of a testamentary character; it was registered as a deed in the life-time of the maker; it contains no words of devise; nor was it the intention of the maker that it should contain any disposition of his estate, except so far as such disposition might result from the adoption of a son under it. He mentions the objects which induced him to make the deed—religious motives, the perpetuation of his family, and the succession

to his property; but it was by the adoption, and only by the adoption, that those objects were to be secured, and only to the extent in which the adoption could secure them.

The main ground of the decision in the Court below appears, therefore, to fail, and this instrument must be construed and its effect must be determined in just the same way as if it had been made in one of the provinces of India in which the power of testamentary disposition is not recognized.

How, then, is the deed to be construed when we regard it merely as a deed of permission to adopt? What is the intention to be collected from it, and how far will the law permit such intention to be effected? It must be admitted that it contemplates the possibility of more than one adoption; that it shows a strong desire on the part of the maker for the continuance of a person to perform his funeral rites, and to succeed to his property; and that it does not in express terms assign any limits to the period within which the adoption may be made. But it is plain that some limits must be assigned. It might well have been that Bhowanny had left a son natural-born or adopted, and that such son had died himself leaving a son; and that such son had attained his majority in the life-time of Chundrabully. It could hardly have been intended that, after the lapse of several successive heirs, a son should be adopted to the great grand-father of the last taker, when all the spiritual purposes of a son, according to the largest construction of them, would have been satisfied.

But, whatever may have been the intention, would the law allow it to be effected? We rather understand the Judges below to have been of opinion that, if Bhowanny had left a son, or if a son had been lawfully adopted to him by his wife under a power legally conferred upon her, the power of adoption given to Chundrabully would have been at an end.

But it is difficult to see what reasons could be assigned for such a result which would not equally apply to the case before us.

In this case Bhowanny had lived to an age which enabled him to perform, and it is to be presumed that he had performed, all the religious services which a son could perform for a father. He had succeeded to the ancestral property as heir; he had full power of disposition over it; he might have alienated it; he might have adopted a son to succeed to it if he had no male issue of his body. He could have defeated every intention which his father entertained with respect to the property.

On the death of Bhowanny, his wife succeeded as heir to him, and would have equally succeeded in that character in exclusion of his brothers, if he had any. She took a vested estate as his widow in the whole of his property. It would be singular if a brother of Bhowanny, made such by adoption, could take from his widow the whole of his property when a natural-born brother could have taken no part. If Ram Kishore is to take any of the ancestral property, he must take all he takes by substitution for the natural-born son, and not jointly with him.

Whether, under his testamentary power of disposition, Gour Kishore could have restricted the interest of Bhowanny in his estate to a life-interest, or could have limited it over (if his son left no issue male, or such issue male failed) to an adopted son of his own, it is not necessary to consider; it is sufficient to say that he has neither done nor attempted to do this. The question is whether the estate of his son being unlimited, and that son having married and left a widow, his heir, and that heir having acquired a vested estate in her husband's property as widow, a new heir can be substituted by adoption who is to defeat that estate, and take as an adopted son what a legitimate son of Gour Kishore would not have taken.

This seems contrary to all reasons and to all the principles of Hindoo Law, as far as we can collect them.

It must be recollected that the adopted son, as such, takes by inheritance, and not by devise. Now, the rule of Hindoo Law is that, in the case of inheritance, the person to succeed must be the heir of the last full owner. In this case Bhowanny was the last full owner, and his wife succeeds as his heir to a widow's estate. On her death the person to succeed will again be the heir at that time of Bhowanny.

If Bhowanny had died unmarried, his mother Chundrabully would have been his heir, and the question of adoption would have stood on quite different grounds. By exercising the power of adoption, she would have divested no estate but her own, and this would have brought the case within the ordinary rule; but no case has been produced, no decision has been cited from the text-books, and no principle has been stated to show that, by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son vested in possession can be defeated and divested.

The only case referred to in the argument before us, or in the judgment below, as tending in that direction, is that of Luckee Narain Thakoor, reported by Sir F. McNaghten, page 168; but it is incontestible that in that case the disposition depended wholly on the testamehtary power. The authority to adopt was only subsidiary to the disposition of the property. The will of Luckee Narain Thakoor is set forth in full in No. 5, page 9, of the Appendix to Sir F. McNaghten's Works. It is termed a will; it appoints an executor; it disposes of the whole estate; gives various legacies; gives the residue to the child of which his youngest wife was pregnant, whether a son or a daughter, in which latter case it would obviously break the legal order of succession; and directs that at that child's death the adoption of a son shall take place. We have already said that we express no opinion as to the power of Gour Kishore to have made the disposition now insisted on by the appellant by devise of his estates; but we find no such devise in the instrument which he has executed.

An additional difficulty, in holding the estate of the widow of Bhowanny to be divested may, perhaps, be found in the doctrine of Hindoo Law, that the husband and wife are one; and that, as long as the wife survives, one-half of the husband survives; but it is not necessary to press this objection.

Upon the whole, we must humbly report to Her Majesty our opinion on the original appeal that the plaintiff's suit ought to be dismissed; but inasmuch as the main expense of it has been occasioned by the appellant setting up a state of facts which has turned out to be untrue, and disputing the facts alleged by the respondent which have been established, we think that no costs should be awarded to either party of the suit or of the original appeal. The cross-appeal is wholly groundless, and we must advise that it be dismissed with costs.

The several orders and decrees complained of, so far as they are inconsistent with the above recommendations, must be reversed.

The 26th May 1865.

Present:

Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, Sir L. Peel, and Sir J. W. Colvile.

Disputed Boundary—Settlement of Pergunnah Havelee—Bunkur and Phulkur rights.

Appeal from the Sudder Dewanny Adawlut at Calcutta.

Rajah Leelanund Singh

versus

Maharajah Moheshur Singh, on his decease Maharajah Lukhmissar Singh, the Government of India, and others.

Suit concerning the boundary-line between contiguous mehals. The land in dispute (which, with the mehals adjacent, originally formed part of a permanently settled zemindary consisting of revenue-paying mehals, and of mehals alleged to be lakheraj, all belonging to one proprietor) was so situated that it necessarily belonged either to Havelee one of the latter, or to the contiguous rent-paying mehals. The Permanent Settlement did not define the boundary, nor was it fixed in subsequent resumption proceedings against Havelee, which ended in a temporary settlement of that mehal for twenty years. The ownership of Havelee having become severed from the ownership of the other mehals, the question of boundary arose, not as a question of revenue between the Government and a zemindar, but as one of title to land between the zemindars and proprietors of two contiguous and separate estates.

A map prepared at the time of the settlement of Havelee, after actual survey and admeasurement under the instructions of the Settlement Officers, did not contain the disputed land. A subsequent survey map attributed the land to Havelee. The effect of these proceedings was to leave somewhat doubtful the question whether the land was included or intended to be included in the settlement of Havelee, or whether it was a *towfeer* or surplus which the Government was still entitled to assess *de novo*.

HELD that the decision of this suit, which was instituted by the appellant, a purchaser at a sale for arrears of revenue of the permanently-settled mehals, to recover 1,75,000 beegahs of land as part of those mehals, depended on the question whether the land claimed or any defined part of it was, in fact, included in the Havelee Settlement; and that, in considering what was included in Havelee, the Court could only deal with the Havelee Settlement, as it stood, as (what must be deemed) a valid and subsisting settlement.

The settlement proceedings showing that the settlement was intended to be of the whole Pergunnah Havelee—HELD that, if any part was by accident not included, it could not be set right in this suit, and that for none of the purposes of the suit could the land be deemed *towfeer*.

There being some evidence that the possession of the disputed land was with the respondent as proprietor of Havelee, and the burthen of proof, therefore, resting upon the appellant, the Court was of opinion that the latter having shewn that Havelee, as settled, consisted only of the measured area of 1,23,000 beegahs, and that this was all comprised in the first map, had at least

shifted the burthen of proof, and established a good *primâ facie* title to recover the whole of the disputed territory.

But among the Sayers or cesses included in the settlement of Havelee, an item was entered in the settlement proceedings as "Bunkur and Boondee mehals," which comprised the revenue arising from certain ghauts as a part of the assets of Havelee. It was established that, during the time when all the mehals belonged to the same owner, the revenue of the ghauts had been treated by the zemindar as part of the revenue of the lakheraj mehal Havelee. These ghauts were situated beyond the limits of the measured area of Havelee, and of the settlement map. The Judicial Committee of the Privy Council, being satisfied that the settlement of Havelee comprised only the measured area and the Bunkur and Boondee mehals and the ghauts of which the same in part consisted, and not being judicially satisfied that the ownership of the revenue of the latter imported also the ownership of the whole tract of land in dispute, remanded the case for further enquiry, with a direction to enquire what was the nature and character of Bunkur and Boondee mehals and of the ghauts comprised therein, and whether they included any right or interest in the land in question or any part of it, and with a declaration that so much of the land in question as might upon such enquiry appear to be comprised in the said Bunkur and Boondee mehals or ghauts belonged to Havelee, and that the appellant was entitled to recover the residue.

The appellant having failed to prove that no part of the disputed land was included in the respondent's settlement (some portion at least being shown to belong to Havelee), and also having failed to prove by independent evidence his own right to recover the land specified in the plaint—HELD that the suit should not have been determined upon that mere failure on his part to support the burthen of proof cast upon him, because the judgment would be as final and conclusive between the parties as an adjudication on the merits would be, and its effect would be to give something to the respondent which, on the evidence, belonged to the appellant's mehals.

The rights of *Bunkur* (a right of cutting wood) and *Phulkur* (a right of gathering fruits) are rights indicative of a certain dominion over the soil.

THE outline of this case is as follows: At the time of the Perpetual Settlement, the large zemindary, known as the Kurruckpore Mehals in zillah Bhaugulpore, was settled with Maharajah Kader Ali Khan, who, in or before 1790, was in possession of it. It consisted of twenty-six Pergunnahs, of which five were alleged to be and were then held as lakheraj. Of these alleged lakheraj Pergunnahs it is only necessary to specify Pergunnah Kurruckpore Havelee, which has, throughout the argument before us, been conveniently called Havelee. Of the malgoozaree or revenue-paying mehals, it is sufficient to name Pergunnahs Suhrooe, Sukrabadee, and the most important of all Purbutparrah, which was sub-divided into Tuppahs Lodhwah and Semroum, Daygee, Mullia, and Bhudra.

The settlement abovementioned was made, as in other cases, by Pergunnahs, without any survey or measurement of the lands comprised in them; and as this vast zemindary included a great deal of wild uncultivated mountainous and forest land, it may be supposed that, however well-ascertained may have been the boundaries of the whole, those of its component parts, or pergunnahs, *inter se*, were not very clearly defined. The effect of the settlement was to fix permanently and for ever the revenue payable in respect of the malgoozaree, or, as they are termed in these proceedings, the Nizamut Mehals, and to leave the lakheraj mehals free from the payment of revenue, but subject to the right reserved to the Government by Regulation XIX. of 1793, to resume and assess the lands should the tenure, under which they were claimed to be held lakheraj, thereafter be found to be invalid. Kader Ali Khan, on his death, was succeeded by his eldest son Ikbul Ali Khan, who also died some time before 1836, and was succeeded by his brother Ruhmut Ali Khan.

In 1836 the Government impeached the lakheraj title of the zemindar. Pergunnah Havelee was resumed and separately settled. The proceedings which resulted in the settlement of it will hereafter be fully considered. At present, it is sufficient to say that they began in 1836, and continued until the 9th of April 1844, when a temporary settlement for twenty years was made with the Maharanee Wujhoonissa, to whom the interest of her husband Ruhmut Ali Khan had been transferred.

Pending the proceedings for the resumption and settlement of this Pergunnah, Ruhmut Ali Khan suffered the Government revenue on the Nizamut Mehals to fall into arrear, and these mehals were accordingly sold by public auction for such arrears, and, on the 11th of August 1840, were purchased by the appellant's father, Rajah Bidianund Singh and another person, who afterwards transferred his share to Bidianund Singh. This sale, of course, put an end to the unity of ownership of the Nizamut Mehals and of Havelee, Bidianund Singh thenceforward being the zemindar of the former, with all the rights possessed by the original zemindar at the date of the Perpetual Settlement; whilst the latter, subject to the rights of Government in respect of the revenue to be assessed thereon, continued to belong to Ruhmut Ali Khan, and after him to Wujhoonissa.

In 1845, Wujhoonissa having failed to pay the revenue assessed on Havelee, that estate was also sold for these arrears, and was purchased by Maharajah Rooder Singh, the grandfather of the present respondent, Lukhmissar Singh, on the 5th of November 1845.

The estates having thus become separate, boundary disputes took place between the owner of the Nizamut Mehals or his tenants on the one side, and the owner of Havelee or her tenants on the other. It may be necessary hereafter to refer more particularly to the proceedings to which these disputes gave rise. At present, it is sufficient to say that the controversy was continuing during the proceedings of the Government surveyors engaged in making a topographical survey of the zillah Bhaugulpore in 1846 and 1847.

It appears to have been the duty or practice of the officers employed in this survey to lay down the boundaries of estates or other divisions of land where there was any dispute concerning them, according to the evidence which they might find of the actual possession of the lands. In the present case they had to deal with a controversy touching the boundary-line between Havelee and Pergunnah Purbutparrah, and the other Nizamut Mehals contiguous to it. The owner of the latter, on the one hand, insisted that this had been conclusively determined at the time of the Settlement of Havelee by a map prepared after actual survey and admeasurement by a Captain Ellis, under the instructions of the Settlement Officers. The owner of Havelee, on the other hand, disputed the accuracy of Captain Ellis's map, if it purported to be a map of the entire Pergunnah Havelee, and questioned the intention to include the whole of Havelee in that map.

The Officers of the survey, relying for the most part on the evidence which they had, or thought they had, of actual possession, came to a conclusion adverse to the appellant's ancestor, and prepared the map known in the proceedings as Captain Sherwill's map, by which upwards of 1,75,000 beegahs of land in excess of that comprised in Captain Ellis's map was attributed to Havelee, and taken out of the Nizamut Mehals, as laid down in that map. The effect of these proceedings was to leave somewhat doubtful the question whether this land was included or intended to be included in the settlement of 1844, or whether it was a *towfeer* or surplus which the Government was still entitled to assess *de novo*.

Some further proceedings afterwards took place in the Foujdary Courts and elsewhere, touching the right to the possession of this land; but the effect of these proceedings was to remit the appellant, or his father Bidianund Singh, to a regular suit, in which alone the title could be litigated.

The suit out of which this appeal has arisen was accordingly instituted by the appellant on the 5th of June 1851. Its object is to recover, as part of the Nizamut Mehals, the 1,75,000 beegahs of land laid down by Sherwill's map as within Havelee, in excess of the land attributed to Havelee by Ellis's map; but the plaint divides this land in certain proportions between certain specified mouzahs, the names of which occur in the lists of the villages comprised in Pergunnahs Purbutparrah and Sukrabadee, which were prepared at the time of the Perpetual Settlement, or shortly subsequent to it. The defendants to the suit, the respondents to this appeal, are the Government, Maharajah Lukhmissar Singh, and some of his tenants, and they insist that the 1,75,000 beegahs of land in question properly belong to Havelee.

The suit was heard first by the Principal Sudder Ameen of Bhaugulpore, who by his decree, dated the 9th of July 1865, dismissed the suit, on the ground that the plaintiff had failed to establish a title to recover the lands in question. This decision was based upon proceedings of the Government surveyors, and seems to imply that the land was *towfeer*.

On appeal to the Sudder Dewanny Adawlut, that Court, by a majority of two Judges to one, confirmed the decision of the Principal Sudder Ameen, but did not adopt its grounds. The two Judges appear to have held that something in excess of the lands comprised in Captain Ellis's map was included in the Havelee Settlement; that the extent of that excess was undetermined; and that it lay upon the plaintiff to show what he was entitled to recover, which he had failed to do.

The *dissentient* Judges, on the contrary, held that no part of the land in dispute was included in the settlement of Havelee, that therefore, *ex necessitate*, the whole must be taken to form part of the contiguous Nizamut Mehals, and that the plaintiff had established his title to recover it.

According to the view, therefore, both of the affirming Judges and of the *dissentient* Judge, the decision of this suit depended on the

question whether the land claimed, or any, and if any, what defined part of it was included in the Havelee Settlement; and we think that this was a correct view of the case. It was incontestible that the land in question formed part of the zemindary, which by the Perpetual Settlement was assured to Kader Ali Khan; but that zemindary consisted partly of the Nizamut or revenue-paying mehals, in respect of which the revenue payable by the zemindar was then finally settled, and partly of the mehals, including Havelee, which were alleged to be lakheraj, and on which, therefore, no revenue was assessed. The land in dispute is so situated that it must necessarily belong either to Havelee or to the contiguous Nizamut Mehals; but the Perpetual Settlement unfortunately omitted to define the boundary-line between Havelee and these mehals; had it done so, the question in the cause could not have arisen: since, we need hardly say, no Court would disturb what had been fixed by the Perpetual Settlement. The resumption of Havelee afforded a fresh occasion for the definition of these boundaries, even whilst both Havelee and the Nizamut mehals belonged to the same owner; because Government, by virtue of the resumption, acquired the right of assessing revenue upon all that lay within the boundaries of Havelee, whilst it had no right to assess any fresh revenue upon a single beegah of land within the Nizamut Mehals. Subsequent events severed the ownership of Havelee from that of the Nizamut Mehals, and the question of boundary then arose in this suit, not as a question of revenue between the Government and a zemindar, but as one of title to land between the zemindars and proprietors of two contiguous and separate estates, the Nizamut Mehals and Havelee.

In dealing with this question, it must, as we have said, be assumed that so much of the land in dispute as was not included in Havelee belongs to the Nizamut Mehals; and, in considering what was included in Havelee, the Court below could only deal, as we upon this appeal must deal, with the Havelee Settlement as it stands. For the purposes of this suit that settlement must be considered as valid and subsisting. If the boundaries of Havelee ascertained by it are at all capable of being corrected, they certainly cannot be corrected in a suit of this nature. All that we can determine in this suit is whether, according to the true construction and effect of the Havelee Settlement taken as it stands, the whole or what part of the lands in question belongs to Havelee, or the whole or what part of them is included in the lands which were the subject of the Perpetual Settlement.

In considering this question three views of this Havelee Settlement present themselves for our consideration.

The *first* is that it included, and was intended to include, the whole of Pergunnah Havelee, and that all which it did include is within the limits of Ellis's map. The *second* is that it included, and was intended to include, the whole of Pergunnah Havelee; but that some portion of what it did include lies beyond the limits of Ellis's map, and is to be found in the district of which the ownership is now in dispute. The *third* is that it did not include the whole of Pergunnah Havelee, but that, either from accident or design, the large district in question, or some undefined portion of it, was omitted from the settlement, as well as from the map, and is now what in these proceedings is called a *towfeer* or surplus.

We proceed therefore to consider the intention, extent, and effect of the Havelee settlement proceedings with reference to these views.

The first of these proceedings is that of the 1st of July 1836 (p. 98). By it Mr. Travis, the Deputy Collector, on grounds which, for the purposes of this suit, must be deemed sufficient, decided against the claim of Ruhmut Ali Khan to hold Havelee, and the other four Pergunnahs to which we have before referred lakheraj, and affirmed the right of Government to resume and assess them.

There was an appeal against this order, pending which the Government not being able to effect an arrangement with the zemindar as to the intermediate collections of Havelee, assumed the management of it by a tehsildar of their own appointment (p. 183). The appeal was dismissed on the 30th of November 1837, by a special Commissioner acting under Regulation II. of 1828 (p. 183), and the title of Government to assess the whole of Havelee thus became complete.

It then became the duty of the Deputy Collector or the Settlement Officer, under Regulation II. of 1819, Section 21, Clause 4, "to ascertain the limits of the land" (*i.e.*, of the whole of Pergunnah Havelee), and to fix the assessment; and various proceedings were had with this object. Most of these proceedings are found *in extenso* in the first

volume of the printed record, and we must refer to the more important of them.

On the 9th of April 1838 (p. 123), Mr. Farquharson, described as the Superintendent of the Khas Mehals, but acting as the Settlement Officer in the case, held a proceeding as to Havelee. After reciting that the *Surhudbundee* and *Rookbabundee* (the specifications of boundaries and area) were not with the record, it ordered Ruhmut Ali Khan to file a list of the villages of Havelee, and also of Pergunnahs Suhrooe, Sukrabadee, Singhool, and Luckhunpore, Pergunnah Purbutparrah (these being doubtless assumed to be the contiguous Nizamut Mehals), accompanied by a *Surhudbundee* thereof. It also ordered the Putwarries to file the *Surhudbundee* and *Rookbabundee* of their respective mouzahs. The object obviously was to obtain a definition, by metes and boundaries, both of the whole Pergunnah and of its component villages.

At pp. 124 and 125, we have the actual process issued in respect of Rounuckabad, a principal village of Havelee, under this order, and the return to it. The dates are 17th April and 31st May 1838.

At p. 350 there is a proceeding of the 14th April 1838 before Mr. Farquharson. It complains of the omission of a village, named Bheembandh, though part of Havelee, and that two other villages have been returned as waste, though, in fact, they were inhabited. It directs the attachment of Mouzah Bheembandh as far as Koh Marug, Tuppah Dighee, and gives other directions that are not material to the present question. It orders notice to be sent to Ruhmut Ali Khan that no settlement will be concluded with him unless he files correct jummabundee papers.

On the 11th November 1838 (page 403), Mootee Lall, the Tehsildar appointed by Government, reported to Mr. Farquharson that two mouzahs adjoining Bheembandh, one named Goormah, the other Pakum, were west of Bheembandh in the hills, and asked for an enquiry concerning them.

This led to Mr. Farquharson's proceeding of the 23rd of January 1839 (page 414). In that, after stating that it had come to his knowledge that two villages (there called Tollahs) are situated in Bheembandh, but had not been attached, he directs the issue of a purwannah to Mootee Lall, ordering him to bring these Tollahs under collection, and to explain why they had not been resumed along with Bheembandh.

At p. 143 we have the report of Mootee Lall in answer to this order; it is dated the 8th of April 1839. It appears to be endorsed on the purwannah; and reports that, after the issue of it, Mr. Farquharson had arrived at Kurruckpore, and had given a verbal order to relinquish Mouzah Koormaha (which is obviously the same place as that previously called Goormah), and to have the survey of Kita Bakum (before called Pakum) made with Bheembandh: that afterwards a purwannah of the 23rd of March, directing a separate survey of Bakum, had arrived, and that accordingly Mouzah Kormaha had been relinquished, and Mouzah Bakum would be surveyed. On this report Mr. Farquharson has endorsed "That this be put up with the record: May 16, 1839."

Intermediately Mr. Farquharson seems to have taken the depositions of Meer Dad Khan, a former Tehsildar of Havelee, and of Bhowanny Lall, described as an inhabitant of Havelee, but Peshkar of Pergunnah Purbutparrah. The former was taken on the 8th of April 1839, and is at p. 125; the other was taken on the 15th of March 1839, and is at p. 141. They may have conduced to Mr. Farquharson's determination to relinquish Kormaha.

At pp. 103, 116, and 118, are detailed measurements of the lands of Mouzahs Rounuckabad, Bheembandh, and Modhobun. The second alone is dated; and as the date is the 24th of March 1839, it may be inferred that Kita Bakum, which by the report of the 8th of April is treated as about to be separately measured, was not included in this measurement.

On the 15th of April 1839, Ruhmut Ali Khan (p. 208) presented a petition, which, as we understand it, is confined to Bakum as a Kita or part of his Nizamut Mouzah Bhorebhandaree. He protests against its inclusion in Havelee. The petition seems to have been presented to Captain Ellis, then engaged in surveying Havelee, and making his map. He, on the 22nd of April 1839 (page 209), directed a copy to be sent to the Settlement Officer (Mr. Farquharson), who on the 6th of May 1839 (also page 209) directs the Officer (Ellis) to be informed that the case is pending in that Cutcherry. The decision was adverse; for at page 144 we have a further petition from Ruhmut Ali Khan, which (and as it seems wilfully) confounds Bakum with Kormaha. Alleging that the former, though relinquished, had been separately surveyed by Mootee Lall; that the

measurement papers of Havelee are being prepared, and Kita Bakum inserted in the English map, and stating that he objects to take attested copies of the English map, because Kita Bakum (a Nizamut Mehal) is inserted in it. The order endorsed on this petition is dated the 8th July 1839, and is that it be rejected.

On the 14th of September 1839, a summary settlement was concluded by Mr. Farquharson with Ruhmut Ali Khan for one year, *i. e.*, from 1st May 1839 to 30th April 1840; and this by a subsequent order was confirmed and extended to April 1841. (*See* page 183.)

It was during the currency of this temporary settlement that the Nizamut Mehals were sold, and Ruhmut Ali Khan's interest became limited to the resumed mehals.

It is also probable that, during the same period, Mr. Beadon began the investigation, which resulted in the proposal for a Permanent Settlement next to be considered: and that, in aid of that investigation, Captain Ellis, by his proceeding of the 30th of June 1840 (p. 123), directed "the measurement papers of the mouzahs of Havelee, filed by the Ameens, which had, on comparison with the English measurement papers, been found to correspond," to be forwarded to the Superintendent of Khas Mehals.

Mr. Beadon's final settlement proceeding is set forth from pp. 182 to 203, and is dated the 16th of December 1841. It gives a summary of the former proceedings, and states that "whereas a Perpetual Settlement of that mehal (Havelee) was proper, and the mehal having been surveyed by the Revenue Surveyor (who, from the mention of his name in the next paragraph, is clearly Captain Ellis), the measurement papers are forthcoming in the Office. Hence, after enquiring into the jummabundee, from the statements and papers of the cultivators and putwarries, a Perpetual Settlement had been, conformably to Regulation VII. of 1822, concluded from the 1st of May 1841."

The proceeding then details at great length the principles upon which this Settlement had been effected. It seems sufficient to state that Mr. Beadon took the area as measured at 1,23,207 beegahs and a fraction. From this he deducted 60,433 beegahs and a fraction as absolutely jungle, waste, and unculturable, leaving a balance of 62,774 beegahs and a fraction. This, again, when sub-divided, was found to consist of 18,998 beegahs and a fraction of land actually cultivated, and producing, or capable of producing, rent; and of 43,775 beegahs and a fraction of land which, though not cultivated, he describes as "culturable." The annual revenue derivable from the cultivated land, he estimated (*see* p. 199) at Sicca rupees 15,517, to which he added Sicca rupees 738-2, the amount of sayers or miscellaneous revenue (a description of revenue which will require further consideration), making the total revenue Sicca rupees 16,255-6. The moiety of this being, when converted from Sicca, Company's rupees 8,666 and a fraction, he fixed as the revenue payable perpetually, abandoning all further claim to revenue from either the 43,775 beegahs of culturable, or the 60,433 beegahs of unculturable land.

It is to be observed that Bakum (spelt Bakhum) is included in the list of villages, its measured area being stated to be 129 beegahs 19 biswas. It follows, therefore, that, whether the Bakum resumed by Mr. Farquharson be in Ellis's map or not (a question hereafter to be considered), its measured area is included in the 1,23,207 beegahs, the basis of that settlement.

It is further to be observed that there is no trace of Goormah or Kormaha in this or the subsequent settlement proceeding.

Again, it is to be observed that the total of the miscellaneous revenue, sayerat, or cesses, was taken by Mr. Beadon to be Sicca rupees 738-2, of which Sicca rupees 576 consisted of rents payable by the lessees of the sayer mehal, according to the deposition of Ameen Dad Khan, taken on the 14th of March 1841, which will be found at p. 316, and the rest consisted of the sayers returned by the putwarries and ameens as specified at p. 198. We may here observe, too, that in the Sicca rupees 576 is included an item of Sicca rupees 400, payable by Rujjub Ali as farmer of "Ghauts Marug and Kurrailee, &c.," touching which we have also his deposition, taken on the 24th of March at p. 317, and the ummulnamah of 1248 (1841) at p. 318, a document which may be of some importance with reference to the present enquiry; for whilst it gives the names of various ghauts, as proposed to be included in the lease to which it refers, it seems to indicate that the lease was to comprise, not only such tolls as may be conceived to be leviable from persons passing the ghauts, but Bunkur, which properly is a right of cutting wood, and Phulkur, a right of gathering fruit—rights indicative of a certain dominion over the soil in a given locality.

On the 16th of September 1843, Mr. Beadon's proposal of a Permanent Settlement on this basis was over-ruled by the Commissioner, who on the 25th of the same month made over the estate to Mr. Joachim Piron to be settled *de novo* (p. 204).

Shortly before this, and on the 13th of June 1843, the transfer of Havelee from Ruhmut Ali Khan to Wujhoonissa had taken place (p. 205).

Mr. Piron's first step was to ask whether he was to make a new measurement. He was told to test the former measurement; to adopt it if he found it to be correct; to make a new one if he found it to be incorrect (pp. 128 and 129).

Mr. Piron's general report bears date the 20th of June 1844, and is at p. 203; his settlement proceeding of the same date is at p. 334; the Doul Settlement at p. 134. The report states that he made a settlement for twenty years with Wujhoonissa, of which the other papers give the details and the principles.

His report, at p. 204, also states expressly that the measurement which he tested was that completed under Captain Ellis; that it found it correct in every instance; and that his only objection to the former survey regarded the classification of the various qualities of land, and the rates assessed thereon.

The result of Mr. Piron's settlement was somewhat different from that of Mr. Beadon. But it is perfectly clear that both Officers dealt with the same measured area —*viz.*, the 1,23,207 beegahs and a fraction defined by Captain Ellis. Mr. Piron, however, making a somewhat different classification of the lands, fixed the amount of revenue derivable therefrom by the proprietor of Havelee at Sicca rupees 20,678-3-17½. In this he included the sum of Sicca rupees 2,336-8-9¾ for sayerat, cesses, or other miscellaneous revenue. Instead of leaving, as Mr. Beadon had done, free from any direct assessment of revenue 60,443 beegahs of unculturable + 43,775 beegahs of culturable land, making together 1,03,209 beegahs of land, he excludes from assessment only 4,447 old fallow land + 35,051 rocks, with jungle, + 42,586-8-4 of jungle, making a total of 82,084 beegahs and a fraction of land free from assessment.

The result of Mr. Piron's proceedings was a settlement with Wujhoonissa for twenty years at the moiety of the gross rental as estimated by him, which, when converted into Company's rupees, amounted to Company's rupees 11,028-12-10.

The documents by which this arrangement was carried out with her are her petition, her kubooleut, and Mr. Piron's final order, all of the 9th of April 1844, and at pp. 135, 136, 137. In the kubooleut she describes herself as occupier of the entire Pergunnah Havelee, and says 1,23,186 beegahs and a fraction "of land of the said pergunnah have been taken by me from you under temporary settlement at an absolute sum of Company's rupees 11,128-12-10, being a moiety of the jumma, including Julkur, Bunkur, Phulkur, &c."

We stop at this point in order to state the conclusions at which we arrive from the proceedings and documents above referred to, in so far as they do not relate to the sayers or cesses or miscellaneous revenue—conclusions which, in our judgment, are no way affected by what has already appeared, or by what we shall presently state as to these sayers and cesses or miscellaneous revenue. We are satisfied from these proceedings and documents that the Settlement Officers throughout intended to resume and settle and assess the revenues of the whole of Pergunnah Havelee, and that they throughout proceeded on the assumption of the correctness of the survey, measurements, and map made by, or under the inspection of, Captain Ellis. Looking to the great care and the minute attention which was given to the settlement of this pergunnah, it cannot be supposed that any portion of it was designedly omitted from the settlement; and, if any portion of it was omitted by accident, this is not a suit in which the accident can be set right. We think, therefore, that the third view of this settlement to which we have above referred may, for the purposes of this suit, be laid out of consideration; and that no part of the district in question can, for any of those purposes, be considered as *lowfeer* or surplus. We are also satisfied, from the evidence afforded by these proceedings, that Bakum was included, not only in the measured area of 1,23,186 beegahs, but also in Ellis's map. The objection expressed by Ruhmut Ali Khan, in his rejected petition at p. 144, to take attested copies of the map, because it included, or was about to include, Bakum, is, we think, sufficient to prove this to have been the case.

Again, we are satisfied from these proceedings, and especially from the report of Mootee Lall, at p. 143, and Mr. Farquharson's mode of dealing with that report,

and from the absence of all mention of Goormah or Kormaha in the subsequent settlement proceedings, that that village was advisedly relinquished by Mr. Farquharson as part of the Nizamut Mehals, and probably as part of Mouzah Bhorebundharec in Pergunnah Purbutparrah.

It may be convenient also here to add, although it has no immediate reference to the foregoing proceedings, that, from the proceedings at p. 223, the case of Mouzah Ghorakhore appears to have been solemnly decided in favor of the Nizamut Mehals; and that, in our opinion, the proceedings of the Officers of survey, at pp. 150 and 167, are not entitled to weight as against that decision. We think, indeed, that the settlement of 1844 affords the only safe criterion for determining what belongs to Havelee, and what to the Nizamut Mehals.

It results from what we have already stated that, looking at this case without reference to the sayers, cesses, or miscellaneous revenue, we should have come to the conclusion that Havelee, as settled, consisted only of the measured area of 1,23,186 beegahs; that this was all comprised within Ellis's map, and that the appellant, by showing this, had, at least, shifted the burthen of proof, and established a good *primâ facie* title to recover the whole of the disputed territory; but it certainly cannot be denied that what appears upon the record before us as to these sayers or cesses, and this miscellaneous revenue, raises a very serious question whether some territory, in excess of the measured area, and beyond the limits of Ellis's map, does not belong to Havelee, and was not included in the settlement of it. It is necessary, therefore, to see how the case stands as to these sayers or cesses, or miscellaneous revenue. By Mr. Beadon's settlement the revenue derived from these sources is stated to amount to Sicca rupees 738-2, and we have already shown how that sum was made up. By Mr. Piron's settlement the sayers or cesses are stated as amounting to 2,336 rupees 8 annas 9¾ pies, made up partly of the sums returned by the putwarries and ameens as the sayerat of their respective villages, and partly of sums aggregating Sicca rupees 1,116, which were not so returned: this last-mentioned item being thus entered in the settlement proceedings at p. 431: "Bunkur and Boondee Mehals, besides the Putwarries' paper, whatever came to light by the depositions of farmers and persons informed, and by the perusal of pottahs, &c., Sicca rupees 1,116." We have here, therefore, some at least of these sayers or cesses described as Bunkur and Boondee Mehals; and other parts of this voluminous record contain the same or a similar description of them. We are of necessity, therefore, led to enquire what these Bunkur and Boondee Mehals really were; and to some extent, at least, the evidence leaves no doubt upon this point.

Mr. Piron has himself told us (p. 342) that the Sicca rupees 1,116 was made up of Sicca rupees 785, inserted in the pottah of Peer Khan Soobahdar; of Sicca rupees 251 inserted in the deposition of Rajee Singh, son of Durshun Singh; and Sicca rupees 80 inserted in the deposition and pottahs of Posun Pasee and others.

Now, Peer Khan Soobahdar's examination, which seems to have been taken on the 20th of January 1844, is at p. 345. He is described as farmer of Mehal Bunkur and Boondee Koh Marug, and Kurrailee, &c., Pergunnah Havelee. He professes to hold, but in the name of his son Wahid Khan, Ghauts Marug, Kurrailee Tabawee, Khurn Khataun, Hursa Poteeah, Burramupea, Shakole, and several other hills and ghauts, for the names of which he refers to the pottah, at a rent of Sicca rupees 785, and to pay the rent to Ruhmut Ali Khan.

Again, at p. 346, we have the examination of Rajputtee Singh, the son of Durshun Singh, taken on the 30th January 1844, from which and the proceeding of Mr. Piron of the 26th of that month at p. 347, we learn that Durshun Singh was farmer of Mehal Bunkur, Ghaut Koolurhea, attached to Mouzah Mudhoobun, Purgunnah Havelee: that he, during the subsistence of his lease, paid a jumma of Sicca rupees 251 to Ruhmut Ali Khan, who, on the expiration of the lease in April 1844, was about to bring that Bunkur Mehal under his personal collection.

The Sicca rupees 80 "inserted in the depositions and pottahs filed by Posun Pasee and others," we have been unable to trace in the record.

Again, Mr. Quintin's letter of the 19th October 1848 (*see* p. 249) refers to a variety of ghauts as included in Piron's settlement; and, so far as we can see, they can have been so included only under the head of Bunkur and Boondee Mehals.

Again it is clear upon the evidence that Ghauts Marug and Kurrailee, and possibly other ghauts held by Peer Khan Soobahdar in the name of Wahid Khan, at the date of Mr. Piron's settlement, were at the date of Mr. Beadon's settlement, held by Rujjub

Ali, and, indeed, that the whole of the property, whatever it was, the revenue of which Mr. Beadon estimated at Sicca rupees 576, is included in the property of which the revenue was estimated by Mr. Piron at Sicca rupees 1,116.

It is clear, therefore, that Mr. Piron's settlement did include under the head of Bunkur and Bundee Mehals the revenue coming from certain ghauts, of which the most prominent are Ghauts Marug and Kurailee; and that Mr. Piron was right in including rights in these ghauts, as part of the assets of Havelee is, we think, almost proved to demonstration by the village papers in the second and third volumes to which Mr. Melvill directed our attention.

Some of these are produced by the appellant, others by the respondent, and the two classes show, with a correspondence in minute details that proves their genuineness, that long before the resumption the proceeds of these ghauts were uniformly treated by the owners of the whole zemindary as part of the revenue of the lakheraj Mehal Havelee. Against this evidence it is vain to set the award of Ruhmut Ali Khan after the date of the resumption at p. 217, or the kubooleuts, pp. 261 to 264, or the occasional entry in the village accounts of Morkhut as Marugkhat. They would at most support the theory that there may have been more than one ghaut of the same name, or different rights resulting from the same ghaut; the two former classes of evidence may, indeed, more plausibly be referred to the desire, after the resumption, to claim these ghauts for the Nizamut Mehals, which, until the sale of those Mehals, it was Ruhmut Ali Khan's interest to do.

It must be taken, then, that Mr. Piron not only included, but properly included, the revenue arising from Ghauts Marug, Kurailee, and other ghauts in his settlement; but then the question is, what was this property; and does the ownership of it imply the ownership of any land in excess of the measured area, and beyond the confines of Ellis's map?

There is much evidence bearing more or less directly upon this point. There is the Ummulnamah, to which we have already referred, and there are the various suits and proceedings arising out of the long continued litigation concerning these ghauts.

The earliest of these proceedings which we find is at p. 393, under date the 12th of March 1842. It was before the Magistrate (*i. e.*, in the Criminal Court) under Act IV. of 1840, and arose out of the alleged forcible dispossession of Rujjub Ali, the farmer under Ameer Buksh, of Ghaut Boondee, and Koh Marug, &c., by Munniar Rae claiming the same subjects under a pottah granted by Ruhmut Ali Khan in his capacity of zemindar of the Nizamut Mehals. Bidianund Singh intervened in the suit, objecting that it was brought in collusion with the former proprietor of the Nizamut Mehals, Ruhmut Ali Khan. This may have been the case, but the very objection shows that there was then a dispute whether the parcels in Rujjub Ali's farm, or some of them, belonged to Havelee or to the Nizamut Mehals. The decision as to possession was in favor of Rujjub Ali.

The proceeding of the 24th of March 1841 (p. 321) before Mr. Beadon shows that, during the investigation which led to his settlement, there were disputes between the auction-purchaser and the owner of Havelee touching certain stone quarries stated to be with the hill Mar and part of the Boondee Mehal. The report of the 21st of September 1841 (at p. 321) was obviously made in answer to a reference made in some suit arising out of the same dispute touching these ghauts, which we have been unable to trace. It shows that, as early as the 21st of September 1841, Mr. Beadon had included the ghauts held by Rujjub Ali in the settlement of Havelee.

The question, whether these ghauts belonged to Havelee or to the Nizamut Mehals, continued to be litigated in one shape or another during the whole period which elapsed between the dates of the settlement by Mr. Beadon and that by Mr. Piron.

One instance is the suit of Kishna Tewarree, of which the final proceeding is that of the 12th of June 1845, which gives the history of the whole litigation (pp. 330 to 332). It began with a summary suit brought before the Collector by the naib of the auction-purchasers of the Nizamut Mehals (we presume in their names) against the plaintiff for rent. The Collector has under the Regulations no jurisdiction to entertain such a suit, unless the relation of landlord and tenant subsists between the parties. He, nevertheless, made a decree against Kishna Tewarree for the sum sued for. Thereupon Kishna Tewarree, alleging that he was not the tenant of the purchasers of the auction-mehals, but a sub-tenant of the owners of Havelee, brought his suit in the Civil Court (the Moonsiff's) against Bidianund Singh to quash the Collector's decree as made without jurisdiction.

The Moonsiff decreed in his favor. There was an appeal to the Principal Sudder Ameen who was against him. This was followed by a special appeal to the Sudder Dewanny Adawlut, which remitted the cause back to the Principal Sudder Ameen, with directions to try the proprietary right. This protracted and animated litigation, ostensibly for a sum of less than seven rupees, was obviously made a mode of trying the question of title between Bidianund Singh as the purchaser of the Nizamut Mehals, and first Ruhmut Ali Khan, and afterwards Wujhoonissa (each of whom intervenes in the suit as an objecting party), as the owner of Havelee. The proceeding (pp. 381 and 382) shows that the real issue was whether certain subjects as to which all parties were agreed, including Ghauts Marug and Kurrailee, belonged to Havelee or to the Nizamut Mehals. The proceeding and report of the 9th December 1843 (pp. 328 and 329), showing that Ghauts Marug, Kurrailee, &c., were included in Mr. Beadon's settlement, were before the Court. The decision was that the Moonsiff's decree should be upheld, and that it was impossible to determine the proprietary right except in a regular suit, in which the two claimants should be plaintiff and defendant. Not the least important part of this proceeding is that Bidianund Singh, in his answer in the suit, alleged that the ghauts did not appertain to the rent-free Pergunnah Havelee, *that the Revenue Surveyor had excepted them from the measurement.* The objectors do not contest this last proposition, but insist that they are attached to Havelee, and do not belong to Purbutparrah. Both sides, then, seem to admit that the subject of dispute was beyond the measured area and the confines of Ellis's map. There are similar decisions to the above in other suits at pp. 155, 157, and 359. The last is as late as the 15th of July 1847.

Another instance of litigation involving the same issue is that in which Syed Reaz Ali, claiming as farmer of Tuppah Lodwah, was the suing party. By a proceeding of the 20th of November 1843 (p. 323), the Collector of Monghyr, before whom this person had brought a summary suit to recover rent alleged to be due from one Omachurn, then an occupier of part of the Boondee Mehal, the defendant having pleaded that the property in respect of which he was sued was part of Havelee, and had been settled with Ruhmut Ali Khan, called for the settlement proceeding, and, in its absence, for a report from the Collector of Bhaugulpore, whether Mehal Boondee of Ghauts Kurrailee and Komaruk (obviously the same as Koh Marug) was comprised within the settlement rights of Ruhmut Ali Khan, or was appended to any other mehal.

At page 322 there is a report which was apparently made in answer to this requisition, though there is an inaccuracy in the printed date. It confirms the fact of the settlement as alleged by the defendant. On his coming in, the suit was finally disposed of by Mr. Vansittart, the Collector (p. 326), who dismissed the suit as one which he was incompetent to try, with liberty to the plaintiff to sue in the Civil Court, if so advised. By this proceeding, it appears that Wahid Khan, the then farmer of Ghauts Marug, Kurrailee, &c., under Havelee, had intervened in the suit against his sub-tenant.

Again, the proceedings of the 11th of November 1843, at p. 324; those of the 9th of December in the same year, pp. 328 and 329; and the proceeding of the 16th of March 1844, at page 327, all point to the conclusion that, during the investigation which led to the settlement of Mr. Piron, Meaz Reaz Ali claiming title under Bidianund Singh, if not Bidianund Singh himself, was unsuccessfully resisting the inclusion of the Bunkur of Ghauts Marug, Kurrailee, &c., in the settlement of Havelee. The proceeding of the 11th of May 1844, p. 348, is also some evidence of this.

At p. 395, it appears that Peer Khan Soobahdar delivered over possession of Ghauts Marug, Kurrailee, and the other ghauts comprised in his farm, to the purchaser of Havelee at the sale for arrears of revenue, in November 1845, or attorned as tenant to him.

These contentious proceedings certainly afford a strong inference that Ghauts Marug, Kurrailee, and others, which were included in the settlement, were something beyond the limits of the measured area and Captain Ellis's map. It is impossible to read them without believing that the parties knew well what they were disputing about; and that each was claiming the same things. It is not probable that these things were within the measured area. Bidianund Singh could hardly push his pretensions so far as to claim anything within that area. On the contrary, as we have seen in Kishna Tewarry's case, his contention was that the things claimed were beyond the measured

area, and therefore belonged to him, and the opposite party seems to have admitted the fact, and denied the consequence. Had one of the parties been claiming a ghaut in one part of a mountain range, and the other insisting on his right to retain a ghaut of the same name in another part of the range, it is inconceivable that there should be no trace of such a mistake in the pleadings of the parties, the reports of the Collectors, and the judgments of the Courts. In truth, the mention of the farm sometimes of Rajjub Ali, sometimes of Wahid Khan, in these proceedings, almost establishes the identity of the subject in dispute with the subject of the settlement.

The proceedings of the officers employed in the topographical survey, also bear upon this point.

Of the reports of Talib Kurrim, p. 361, and Syed Mossein, p. 362, both in answer to the petitions from Bidianund Singh and the orders thereon, it is sufficient to say that, if they have no other value, they at least prove that when these persons passed from admitted portions of Pergunnah Purbutparrah in the course of their survey into the disputed territory, they were met by claims on the part of Roodur Singh and his tenants; and a *bond fide* contention, whether the land on which they stood, which they went to survey, and as to the locality whereof there could be no mistake, belonged to the Nizamut Mehals, or as appertaining to some of the ghauts in question, was part of Havelee.

Then came the proceedings of Mr. John Brown of the 29th of December, in which both the parties were in presence (p. 240). Mr. Brown's conclusion is no doubt against the view contended for by the respondent, that the ownership of the revenue of these ghauts imports the ownership of land in excess of the measured area; but his proceedings sufficiently show that what the parties were claiming was in the disputed territory; one witness at least (Lushkurree Lall), p. 242, connects the property claimed with the former holding of Soobahdar Khan; and though Mr. John Brown (p. 246), in his eighth reason, suggests that the Ghauts Marug and Kurrailee, that were settled, are within the measured area, he does not point out where they are situated. Nor was there any suggestion on the part of the opposite party that Roodur Singh had shifted the locality of the property so long in dispute between Havelee and the Nizamut Mehals. Mr. Brown's decision seems to have been overruled by Mr. Quintin, mainly on the ground that it proceeded on his construction of the settlement without regard to the evidence of possession (pp. 170 and 249).

Then followed the proceeding of Surfraez Ali, of the 29th of December 1847 (pp. 160 to 167), in which there may be some false reasoning as to some of the points before him, but which clearly establishes that the ghauts there claimed as comprised in the settlement of 1844 were the ghauts of those names in the disputed territory; and were sworn to by Soobahdar Khan, who seems to have ceased to have any interest in the question, to be the ghauts that were comprised in his lease. It seems very difficult to question the finding of this officer, making a local investigation, that the identity of the ghauts claimed with those settled was made out.

Again, Captain Sherwill was an European officer of rank and of scientific reputation. He is at least entitled to credit for knowing his own business of topographer. He seems to have come by another road to the same conclusion as the Ameens, *viz.*, that a large hilly district belonging to Havelee, and comprising these ghauts, had been omitted from Ellis's map (p. 389). He may be no authority touching questions of property, but he must at least be taken to have laid down accurately in his map the positions of the ghauts known in the district as Marug, Kurrailee, and by other names, about which the parties were disputing before the Ameen. His personal examination of the district is recorded in Mr. Quintin's final proceedings of the 24th of June 1848, at p. 171. On the other hand it is to be observed that Captain Ellis's map does not profess to fix the sites of these ghauts. Their existence within its boundaries is mere matter of speculation suggested by the ingenious and able argument of the Attorney-General, who did not attempt to point out precisely where they were situate.

This evidence, however, seems to us to point for the most part, rather to what was claimed as belonging to Havelee than to the nature and character of the Bunkur and Boondee Mehals above mentioned, and of the revenue arising from the ghauts, of which, in part at least, they consisted; and certainly it does not satisfy us that Havelee, if entitled to

any part, was entitled to the whole of the land in question in right of these Bunkur and Boondee Mehals and Ghauts. It is to be remembered that we have here to deal with a tract of land of enormous extent surrounded by Havelee and other Pergunnahs, and it is not easy to suppose that so large a tract of land should have escaped the attention of Captain Ellis, if the whole of it belonged to Havelee at the time of its being resumed; neither can we easily suppose that this large tract of land could have been intended to have been included in the Havelee settlement under the description of sayers and cesses, when we find that other land of precisely the same quality and character was in that settlement described as land. We find, too, that the officers of the survey have, as we have already pointed out, given to Havelee more than in our opinion belongs to it, and looking to the whole of the evidence in the case, we cannot see our way to conclude judicially that they have been right in giving to it the rest of the land in question.

We agree, indeed, with the majority of the Sudder Judges that the appellant has failed to prove that no part of the disputed territory was included in the settlement, and that he has failed to prove by independent evidence his right to recover the mouzahs specified in the plaint; but we cannot think that they were right in determining the case upon that mere failure on his part to support the burthen of proof cast upon him. Their judgment is not like one in ejectment under the old procedure: it is as final and conclusive between the parties as an adjudication on the merits would be. And its effect, as we have shown, is to give to Havelee something which on the evidence we think belong to the Nizamut Mehals.

In these circumstances the case, we think, is one which called for further enquiry; but in saying this we, by no means, mean to intimate that the appellant can be relieved from the burden of proof. On the contrary, we think that there has been so much of possession on the part of Havelee that the burden of proof must still rest upon the appellant.

For the reasons which we have given, we think that this decree cannot be supported in its integrity, and the order which we shall humbly recommend Her Majesty to make upon this appeal will be—

To reverse the decree, but without prejudice to any question which may arise upon the enquiries to be made as after directed;

To declare the appellant entitled to the Mouzahs Gourmahee and Goruckpore, and the lands comprised therein and belonging thereto, and to all such other parts or any of the lands in question in the suit as are not included in the settlement of Havelee:

To declare that the settlement of Havelee comprises only the measured area of 1,23,207 beegahs, and so much of any of the land in dispute as upon the enquiries after directed may appear to belong or be properly attributable to the Bunkur and Boondee Mehals in the pleadings mentioned, or to the ghauts, of which the same in part consists; and that the rights of Havelee in respect of Bakum do not extend beyond the 129 beegahs and 19 biswas mentioned in Beadon's Settlement, and which are included in the 1,23,207 beegahs;

To enquire what is the nature and character of the Bunkur and Boondee Mehals and of the Ghauts comprised therein respectively, which are included in Piron's settlement, and are therein estimated at Sicca rupees 1,116; and whether the same, or any, and which of them included any, and what part of, or any, and what right or interest in the land in question in this suit;

To declare that so much of the land in question in this suit as may upon such enquiry appear to be comprised in the said Bunkur and Boondee Mehals or Ghauts belongs to Havelee, and that the appellant is entitled to recover the residue of the land in question; and to direct the Court to proceed in the suit as upon the result of such enquiry may appear to be just;

To direct any costs of the suit already paid to be refunded, and the Court to deal with such costs, and all other costs of the suit, including the costs of this appeal, as may seem just, having regard to the declaration aforesaid, and to the result of the said enquiry;

To declare that this order is to be without prejudice to any proceedings which may hereafter be taken for the settlement of Havelee.

The 25th June 1860.

Present :

Lord Kingsdown, the Judge of the High Court of Admiralty, Sir E. Ryan, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

Limitation—Recovery of costs by E. I. Co. for prosecuting Appeals by virtue of the 3 and 4 Wm. IV., c. 41.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

The Government of Bengal

versus

Shurruffutoonissa and another.

Suit for the recovery of costs incurred by the Government of Bengal in virtue of the Statutes 3 and 4 Wm. IV., c. 41, authorizing the Crown to appoint the East India Company to take charge of appeals and bring them to a hearing.

The admission by a defendant that a demand was claimable from some quarter or other, but not as against the property in question, is not an admission within the meaning of Regulation III. of 1793, excepting a suit from limitation under that Regulation.

The Government having been expressly warned that the proper course to adopt for the recovery of the costs was to commence a regular suit, and not to proceed in a summary mode, and having neglected for 13 years to take that course, no "good and sufficient cause" precluding them from obtaining redress according to the exception provided by the aforesaid Regulation could be presumed to justify the exemption of their suit from limitation.

The recovery of these costs does not constitute "a public right" within the meaning of Regulation II. of 1805, enabling the Government to sue notwithstanding the lapse of time.

It will be necessary in this case merely briefly to advert to some of the circumstances which have given rise to the questions discussed at the bar. It appears that there was a suit of very old standing; of such great antiquity that even the parties do not attempt to state at what period an appeal to His late Majesty in Council was lodged against a decision of the Court of Sudder Dewanny Adawlut at Calcutta. Some time prior, however, to the year 1833, an appeal had been preferred by Shah Assud Oollah, the father of one of the present respondents, against Mussumat Emamun, as respondent.

In virtue of the Statute* that was passed, giving authority to the Crown to appoint the East India Company to take charge of appeals and bring them to a hearing, the cause was heard; the appellant was condemned in costs; and the decree of the Court below was affirmed. Previous to the hearing it seems that Shah Assud Oollah had died. It does not appear from any of the proceedings in this case that the present respondent (his son) had anything to do with that appeal whatever individually; but his father having been condemned in the costs, proceedings were taken against the son, as possessing the property of his father, for the realization of the sum due for costs.

In the year 1837 the first proceedings in the present case were adopted, and the mode of proceedings was this: The East India Company, in virtue of the rights they had acquired to recover the costs, proceeded against the son, and also against the wife. They proceeded for the purpose of rendering certain property, which was claimed by the wife as having been conveyed to her by deed of gift of her husband, amenable to the payment of those costs.

These proceedings went on, and by a decree of the Zillah Judge, which was made on the 29th December 1837, a sale of half the real property of Shah Enaet Hossein was directed to be made. But Mussumat Shurruffutoonissa was dissatisfied with this order, and appealed to the Court of Sudder Dewanny Adawlut, and, on the 31st of January 1839, the Court reversed the order of the Zillah Court, and ordered all the property comprised in the decree of the Court below to be released, upon the ground that no summary order could, in the existing state of things, disturb her possession.

Now, it is important to see what was really the tenor of that order, as set forth in the judgment of the Court of Sudder Dewanny Adawlut, which states the facts more particularly. It appears that this property had been registered in the Collectorate in the name of the respondent; that it had been alleged to have been given up by deed of sale in lieu of dower; and that she had, rightly or wrongly, obtained a decree on the 17th May 1830 in her favor. Now, the Sudder Adawlut in that case very clearly intimated what was the state of things, namely, that it was impossible that the order of the Judge of the Court below could be affirmed, because the only mode of proceeding was that which they directed her to adopt, namely, to proceed regularly to bring the property to sale, and no summary order disturbing her possession could be passed.

* 3 and 4 Wm. IV., c. 41.

This took place, as has been stated, on the 31st of January 1839, and no further proceedings were taken on the part of the Government to realize the payment of these costs by means of the sale of this particular property, until the year 1852, after the lapse of thirteen years. When this case came to be prosecuted after the year 1852, the only objection we need notice was an objection made on behalf of the present appellants, that the suit could not be brought on account of its being barred by the Statute of Limitations.

We will address our attention, therefore, to that question at once.

Two Statutes of Limitation have been adverted to by the Counsel for the parties before us, namely, Regulation III. of 1793, and Regulation II. of 1805. Assuming that it was possible that this suit might be governed by Regulation III. of 1793, Mr. Forsyth raised a question that it was excepted, by virtue of certain words found in that Regulation, from the operation of that Statute itself, without reference to Regulation II. of 1805; and he stated that the money had been demanded from the appellants for the matter in question; and that the defendant admitted the correctness of the demand. Now that the money was demanded may be perfectly true, and that the defendant might have admitted that the demand was claimable from some quarter or other may be perfectly true; but that, according to the intent and meaning of the words of the Regulation, he admitted that there was a claim as against the property in question, there certainly is not one atom of evidence before their Lordships.

Their Lordships think, therefore, that that Clause in the first Regulation can have no operation upon this case.

Let us, then, consider the second question. There is an exception, "when either from minority or other good and sufficient cause, he had been precluded from obtaining redress." I will not say that "other good and sufficient cause" are not words so comprehensive that they might, by possibility, extend to anything that may, in the ordinary meaning of these words, constitute a good and sufficient cause; but is there any good and sufficient cause upon the present occasion? Here, in the month of January 1839, there is an express warning given to the Government, who had then sought to make this property amenable to the costs that the proper course was to commence a regular suit, and not to proceed in a summary mode. They had the proper course pointed out to them; they had pointed out to them the only course by which they could make this property amenable; and they neglected for the whole period of thirteen years to take any such measures. It is, therefore, quite clear, giving the most extensive meaning to the words "other good and sufficient cause," that it is impossible to say that, "either from minority or other good and sufficient cause," they were precluded from obtaining redress.

We now come to what is certainly a very important point, namely, whether Regulation II. of 1805 extends to the present case, so as to enable the Government to sue, notwithstanding the lapse of time. Undoubtedly the great object of that Regulation of 1805 was to prevent vexatious suits, in consequence of the litigiousness that generally prevailed among the natives of India, and, in all probability, it was not intended at that time to embarrass the East India Company, or the Government of India. But, be that as it may, Regulation II. of 1805 expressly declares that this Statute of Limitations should not be considered applicable to any suit for the recovery of public revenue, or for any public right or claim whatever, which might be instituted by or on behalf of Government, with the sanction of the Governor-General in Council, or by direction of any public Officer or Officers who might be duly authorized to prosecute the same on the part of Government; or, *secondly*, to any claims on the part of Government, whether for the assessment of land held exempt from the public revenues without legal and sufficient title to such exemption, or for the recovery of arrears of the public assessment, or *for any other public right whatever*.

Now, the question turns on the meaning that ought properly to be attached to these words, "*any other public right whatever*." Perhaps it would be too strict a construction to say that these words shall be construed precisely to be *ejusdem generis* with those matters which are mentioned before, namely, "the assessment of land held exempt from the public revenue without legal and sufficient title to such exemption, or for the recovery of arrears of the public assessment;" but, although they may not be construed with that degree of strictness, yet they must be taken to depend upon the same principles, otherwise the word "public" would have no meaning.

This brings us to the consideration of the question whether the recovery of these costs does or does not constitute a public claim.

The Statute has been read, and we need not go through it again; but by virtue of that Statute His Majesty in Council might give such direction as he thought fit to the United Company, or other persons, for the prosecution of these suits, and also might make such orders for security for, and for the payment of, the costs as His Majesty in Council should think fit. Accordingly, it appears that an order in Council was issued with a view to carry into effect this Statute, and that order in Council directed the East India Company to appoint Agents and Counsel for the different parties in the appeals then pending, to do all such matters and things as had been usually transacted and done by agents in the prosecution of appeals. Now, we are of opinion that these were all private acts between individuals, and that they had not originally in their nature anything of a public character to be ascribed to them. It appears that His Majesty, by another order in Council, directed that the Company should be entitled to demand payment of their reasonable costs of bringing appeals to hearing by virtue of the Act, to such amount and from such party and parties, and should have a lien for the said costs, on all money, lands, goods, and property whatsoever, which might be recovered in such appeal, and upon all deposits which might have been made, and all securities which might have been given in respect of such appeal. In other words, that order in Council placed the East India Company in precisely the same place and position as the winning party would have been in, if the appeal had come on in its ordinary course. It appears to their Lordships that the nature of this transaction was originally of a private character. It continued to be of a private character, and the only distinction that can be drawn is this, that the East India Company are the agents to assert the right of the originally successful party to the costs incurred in the appeal.

It has been observed in the course of this discussion that other persons might have been appointed, and nobody can for a moment say that, if it had pleased His Majesty in his wisdom to appoint any body else to conduct these proceedings and to realize the costs, the parties so appointed would not have sued as private individuals. It pleased His Majesty, however, to appoint the East India Company. Can the appointment of one particular agent change the whole character and nature of the transaction from beginning to end, and convert that which was originally a private transaction, and nothing but a private transaction, into a transaction of a public character so as to bring it within the terms of the Regulation on which we have commented.

Their Lordships are of opinion that the decision of the Court below was right and legal, and they will, therefore, humbly recommend Her Majesty to affirm that decision with costs.

The 7th March 1860.

Present:

Lord Kingsdown, Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

Champerty and Maintenance—Action—Agreement (for lease of Zemindary).

On Appeal from the Sudder Dewanny Adawlut at Madras.

G. F. Fischer

versus

Kamala Naicker, Zemindar of Ammanaiknoor.

Quære.—Whether Champerty or Maintenance according to English Law is forbidden by the law of India.

Although a Court may have the right, and is perhaps even under an obligation, to take cognizance *motu proprio* of any objection manifestly apparent on the face of a proceeding showing that it is against morality or public policy, yet, where this is only to be collected from the evidence by inference, and is capable of explanation or answer by counter-evidence, it is highly inconvenient, and may lead to the most direct injustice to enter into the enquiry if the issue has not been presented by the pleadings or the points recorded for proof.

Where *A* sues in respect of his own interest for the violation of a contract made for him by *B* as agent only, the assignment of *B's* interest, under the agreement in order to enable *A* to bring his suit, is not Champerty or Maintenance.

Where an agreement to grant a lease was incomplete and conditional upon an advance within 8 days required to meet pressing demands, a delay of 19 days was held to be unreasonable, and likely to defeat the object of the lease.

THIS was a suit in the Civil Court of Madura to recover damages from the respondent for the breach of an agreement. Judgment passed in that Court for the appellant, and this judgment was reversed in the Sudder Adawlut. The present appeal is brought for the purpose of procuring a reversal of that decree.

The facts on which the case arise are in substance these: On the 25th October 1846 the agreement in question was entered into between the respondent on the one hand, and Narisahma Chettyar on the other, who is thus described in the commencement of it: "A dealer in silk thread, an agent of Mr. Fischer, residing at Salem, but now on circuit at Ramnad." Narisahma was, in truth, acting as Fischer's (the appellant's) agent, whose residence was at Salem, and he was at the time absent on circuit as described.

The agreement is set out at page 40 of the joint Appendix.

On the day of the execution of this instrument the respondent also executed a bond and a conditional mortgage of a village attached to his zemindary, for a loan of 1,000 rupees from Narisahma, which were then advanced, and were to be repaid on the 1st November following; this was to meet one of the debts enumerated in the preceding agreement. In this transaction also Narisahma was acting as, and was described in the instrument to be, "the agent of Mr. Fischer, residing at Salem, but now on circuit at Ramnad."

The appellant did not return by the 1st November, nor until some days after the 9th, on which day, in violation, as the appellant alleges, of the agreement to which he claims to have been the principal party, the respondent executed a lease of the zemindary to one Mr. Fondclair.

This led to proceedings in which Narisahma was made the plaintiff for the purpose of enforcing the performance of the agreement. These proceedings failed, and the lease to Fondclair was supported; whereupon the appellant determined to institute the present action for damages, and Narisahma being dead, it was thought desirable for him to institute it in his own name; but the original agreement having provided that the lease should be made to Narisahma, and he having been the ostensible party to the previous proceedings, the following assignment was procured from his son, Condiah Chettyar (*see* Appendix 4, No. 12). The action and appeal then followed, which have been already mentioned.

The decree of the Sudder Adawlut did not pass on the merits, nor on any point raised in the Court below; but, it having been objected that the suit disclosed a case of champerty, the Court resolved to entertain the objection; because, as they say, they thought themselves responsible for upholding the law in its integrity: they confined the addresses of the pleaders on either side to that one question, and decided the case against the present appellant on that point only.

Their Lordships are clearly of opinion that the decree of the Sudder Adawlut in this respect cannot be supported. The grounds on which they arrive at this conclusion make it unnecessary to decide whether, under the law which the Court was administering, those acts which in the English Law are denominated either maintenance or champerty, and are punishable as offences, partly by the Common Law, and partly by Statute, are forbidden; and also, if so forbidden, whether the point was in this case so raised by the pleadings or the points for proof recorded by the Court, that it could be properly entered into. They will observe, however, in passing that, although it may be admitted that the Court would have the right, perhaps even lay under an obligation, to take cognizance *motu proprio* of any objection manifestly apparent on the face of the proceeding, which showed that it was against morality or public policy; yet where, as here, that was only to be collected from the evidence by inference, and was capable of explanation or answer by counter-evidence, it is highly inconvenient, as well as contrary to the ordinance which regulates the practice of the Court, and may lead to the most direct injustice to enter into the enquiry if the issue has not been presented by the pleadings, or the points recorded for proof. But, assuming that in the present case the Court properly instituted the inquiry, their Lordships do not agree with them in the conclusion to which they conducted it.

The Court seem very properly to have considered that the champerty, or, more properly, the maintenance into which they were enquiring, was something which must have the qualities attributed to champerty or maintenance by the English Law; it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary. It was necessary, therefore, to look at the sub-

stance of the transaction, and not merely the language of the instruments. Now, here it is clear that the appellant was the real party to the original agreement, and the person really interested in its performance; he was to advance the loan; the profits that were expected to result from the loan were to be his; he might have intervened in the first instance, and conducted the litigation which first ensued in his own name. Narisahma was but an agent, contracting for the appellant in his own name, but avowedly as agent only, not undertaking to borrow from the appellant the money, and then lend it to the respondent, but to procure for him the loan of it from the appellant. All this was perfectly consistent with his being put forward as the ostensible party, with the full knowledge of the respondent. This was the substance of the contract, and the Court should have treated the assignment from Candiah Chettyar as merely an unnecessary precaution unwisely adopted perhaps, and furnishing an argument for an objector, yet not really altering the quality of the transaction, nor affecting that point on which the whole question of maintenance depended, which was this—Was the appellant suing in respect of his own interest for a violation of a contract made with himself, or was he representing another man's interest, and suing on a contract to which he had been originally a stranger, in virtue only of the objectionable assignment? If this had been borne in mind, their Lordships think that the Court would have arrived at a different conclusion from that which they in fact came to.

Here, therefore, their Lordships would have stopped, simply recommending that the judgment should be reversed; but in the commencement of the argument it was arranged, with the consent of the Counsel on both sides, that if their Lordships should be of opinion that the decision of the Court below could not be sustained on the grounds on which it had been based, they should proceed to consider the whole case on its merits, and finally dispose of it—a course by which it was probable that much litigation and expense might be saved to the parties.

Their Lordships have, therefore, examined the facts of this case as they appeared before the Civil Court of Madura. As it is indisputable that a lease of the zemindary has not been granted to the appellant or his agent Narisahma, it is clear that the appellant ought to recover if there was ever a binding contract between the parties to grant one, unless the non-performance of that contract be in any way justifiable. The first of these must be ascertained by an examination of the agreement of the 25th October 1846, of the circumstances attending its execution, and of the remaining facts of the case. The instrument commences with a recital, that the respondent was under an obligation to pay his creditors the sum of 1,90,035 rupees 2 annas 7 pies, made up of items, of which an enumeration follows, and this enumeration shows that the money was wanted without the least loss of time, that the pressure on him was urgent. It then recites a promise from Narisahma to procure the amount from the appellant on his return to Madura; and then it promises to grant the lease; but only "in the event of Narisahma getting the said sum accordingly." It then proceeds to stipulate for a number of payments to be made, things to be done, and conditions to be observed by the lessee, after the lease granted and during the continuance of the term; and it concludes thus: "As the gentleman aforesaid (the appellant) is not here at present, I shall, on his arrival, execute a document in detail on stamped cadjan in the manner dictated by him."

On the face of the instrument, it is obviously a contract incomplete in itself and conditional; nothing in it binds the respondent to the granting of the lease, unless the money were procured for him from the appellant on his return to Madura; and it is clear also that nothing in it binds the respondent to advance the money when he should return. Further, it is obvious that no time being specified for this return, the parties must either by some collateral agreement have fixed a day for that return, or must be taking to have contemplated what the law would imply from their language, a return within a reasonable time, all the circumstances considered. For the respondent setting out his urgent necessities, showing the pressure that was on him, and professedly borrowing the money, not to meet future casual or uncertain expenses, but to liquidate the debts which occasioned the pressure then upon him, it would be highly unreasonable to suppose that a return after any indefinite period, however long, could have been in the contemplation of the parties. And this conclusion is strengthened by the circumstance that there is no evidence of any previous authority from the appellant, constituting Narisahma his agent to make the contract; indeed, the instrument itself shows that he was not bound, that it was uncertain

whether he would on his return adopt and ratify the act of Narisahma; and the conclusion is, therefore, irresistible, that the respondent was bound to wait only for that ratification and performance until the appellant's return on a specified day, or a return within a reasonable time.

The respondent contends that the time was fixed by a collateral parol contract, and limited to the 1st of November, or to eight days from the 25th of October; the appellant, that the return was to be within a reasonable time, that he did return within such reasonable time and forthwith ratified the act of his agent, but that the respondent had in the meantime put it out of his power to fulfil the contract by granting the lease to Fondclair. The undisputed facts of the case are these:—

On the 25th of October, the date of the agreement in question, the respondent executed the mortgage and bond to Narishama as already stated. This appears to their Lordships to have been substantially part of the principal transaction, and to be most material on the point now under consideration; it was a loan of 1,000 rupees to meet one of the demands specified in the agreement, which may be presumed to have been peculiarly pressing, and the 1,000 rupees are stipulated to be re-paid on the 1st November, in default of which the mortgage of a single village was to take effect. Their Lordships think there is every reason for presuming that the re-payment was intended to be made out of the 19,000 rupees to be advanced by the appellant on his return to Madura; and if that be so, it is clear that his return was contemplated to take place on or before that day.

The next fact is that, on the 9th or 10th November, the lease was executed to Fondclair; and the remaining fact is the return of the appellant, on the 13th November, as their Lordships understand the evidence; this would be nineteen days after the execution of the agreement.

There is a good deal of parol evidence to the effect, either that a period of eight days, or that the 1st November, was agreed to specifically by the parties as the term beyond which the respondent was not to be bound to wait for the appellant's return; and their Lordships are disposed to give credit to the evidence: they do not think that the variation in regard to the eight days and the 1st November makes the testimony unworthy of belief. But it appears to them unnecessary to decide the case on this point: for they are clearly of opinion, looking at all the circumstances which appear on the face of the two documents, the *first* of which discloses the nature of the debts due from the respondent, which were mostly judgment-debts, or debts on which the execution was pending, or for which warrants had issued; and the *second* that a portion of the money contracted for was advanced at once, and to be re-paid on the 1st November; that it was understood by both parties that a reasonable time for the appellant's return would be within a few days; and that the delay of nineteen days was unreasonable. Such a delay would probably defeat the whole purpose of the loan; and there is not the slightest evidence that either by reason of distance, difficulty of conveyance, or the necessary or usual business of the circuit, a delay of nineteen days could have been considered probable.

On this ground their Lordships are prepared to recommend to Her Majesty that the appeal be dismissed; but as they do this on wholly different grounds from those relied on by the Court below, that the dismissal should be without costs.

The 15th July 1860.

Present:

Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

Appeal to Privy Council—Dismissal of, for default of prosecution—Restoration of.

On petition to restore an appeal from a decree of the Sudder Dewanny Adawlut at Calcutta.

Ranee Birjobuttee and others

versus

Pertub Sing, Government, and others.

Application for restoration of appeal acceded to, in consideration of the interests of infants being involved in the case, and with reference to the state of that part of India where the matter arises in and after 1857, on condition of the deposit of further security and of the prosecution of the appeal within a certain time.

The security in India was held to have gone by the dismissal of the appeal for default of prosecution.

THE decision proposed to be brought under appeal was ripe for appeal in the year 1856, if not in the year 1855, and the delay in various ways has been so considerable that, notwithstanding the state of India, especially that part of India where this

matter arises, in and since the year 1857, it is probable, to say the least, that if Mr. Baboonau's personal interests had been alone concerned in this matter, the application now made would have been wholly unsuccessful. Their Lordships, however, cannot but give some degree of attention to the circumstance that there are infants concerned whose interests were confided to him. Now, their Lordships do not mean to go to the length of saying that where infants are concerned any degree of delay may be considered justifiable or excusable, or such as may be passed over: there may be circumstances so strong as even to prevent infancy from being an apology or an excuse. Their Lordships, however, after much consideration, do not view the present case in that light, and considering the apology or excuse of infancy, and considering the manner in which the interests of minors are involved, and the state in which the part of India from whence the case comes was, in and after the year 1857, their Lordships are of opinion that on certain terms this application may be acceded to.

The applicant, their Lordships think, must pay the costs of the present application. The applicant, their Lordships think, must find security, that is, find a deposit to the amount of 600*l.*, to be made on or before the 1st December next, and he must undertake to have the appeal set down so as to be in their Lordships' list for hearing at the sittings after Hilary Term next.

Mr. Rolt.—That will enable us to communicate with India.

Lord Justice Knight Bruce.—One of their Lordships' reasons in thus deciding has been that the security in India is gone by the dismissal of the appeal. Security was given, I think, to the amount of 4,000 rupees in India; that is gone: therefore, if that money were deposited, you would be able to get it back.

Mr. Rolt.—I was not aware that it would have actually gone by the dismissal of the appeal.

Lord Justice Knight Bruce.—Upon that footing we fix the amount of 600*l.* on the hypothesis that that security is gone, and that you will obtain it back.

Mr. Rolt.—If that security stands it would be 200*l.* in addition: that would answer your Lordships' purpose.

Lord Justice Knight Bruce.—That, I suppose, would be so, if that security stands; but we do not think it can stand.

Lord Justice Turner.—I do not see how it can stand.

Lord Justice Knight Bruce.—The authorities in India may be informed that we proceed upon the hypothesis that you will be entitled to have that money back.

Mr. Rolt.—Yes, I am much obliged to your Lordships.

The 20th June 1860.

Present:

Lord Kingsdown, Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

Mahomedan Law—Legitimacy—Marriage—Presumption.

On Appeal from the Supreme Court of Judicature at Madras.

Mahomed Bauker Hossein Khan Bahadoor

versus

Shurfoonnissa Begum, an infant, by Syed Fareed, her grand-father and next friend.

According to the Mahomedan Law, the legitimacy or legitimation of a child of Mahomedan parents may be presumed or inferred from circumstances without proof, or at least without any direct proof either of a marriage between the parents, or of any formal act of legitimation.

THE question in the present appeal from the Supreme Court of Judicature at Madras, between Mahomedans, is whether, upon the evidence in the case, the appellant ought to be considered as the lawful brother of Shasaver Jung Bahadoor, that is to say, the lawful son of Oomdut Ool Oomrah, a Mahomedan, formerly Nabob of the Carhatic, the father of Shasavar Jung Bahadoor who, having survived Oomdut Ool Oomrah for more than half a century, died at Madras in the year 1856.

The point arose in a suit, in the Court already mentioned, for administering the estate of Shasavar Jung Bahadoor, the decree in which, dated the 9th February 1858, directed, among other things, a reference to the Master of the Court, to enquire and report whether the appellant was a brother of Shasavar Jung Bahadoor, and directed that, for that purpose, the appellant (not a party to the cause) should be at liberty to go before the Master.

The appellant, availing himself of this permission, carried in a state of facts and charge

before the Master, which (contained in p. 10 of the Appendix) is in these terms :—

"That the Master was directed to enquire and report to the Court whether the said Mahomed Bauker Hoossain Khan Bahadoor is a brother of Shasavar Jung Bahadoor, the intestate, in the pleadings of this cause named.

"That Shasavar Jung Bahadoor, the said intestate, was the son of Oomdut Ool Oomrah Bahadoor, Nabob of the Carnatic, now deceased.

"That the said Oomdut Ool Oomrah Bahadoor, Nabob of the Carnatic, the father of the said Shasavar Jung Bahadoor, deceased, was some three or four years prior to his death* married, in the form usual amongst Mahomedans for performing Nicka-marriages, to one Ameen Sahiba *alias* Buddee Beebee.

"That the said Mahomed Bauker Hoossain Khan Bahadoor was the only issue of the said marriage, and was the son of the said Oomdut Ool Oomrah Bahadoor, Nabob of the Carnatic, by his Nicka wife the said Ameen Sahiba *alias* Buddee Beebee,† and is, therefore, the brother of the said Shasavar Jung Bahadoor, deceased.

"That the said Mahomed Bauker Hoossain Khan Bahadoor has, from the date of his birth up to the present time, been acknowledged, treated, and received by the Governor in Council in Madras, by the Nabobs of the Carnatic, his relations, and by the late Shasavar Jung Bahadoor, deceased, in his life, and by his relations and friends, as the son of the said Oomdut Ool Oomrah Bahadoor, Nabob of the Carnatic, and as the brother of the said Shasavar Jung Bahadoor, deceased.

"That the said Mahomed Bauker Hoossain Khan Bahadoor and Shasavar Jung Bahadoor, deceased, were, on the death of their father, the said Oomdut Ool Oomrah Bahadoor, Nabob of the Carnatic, on the representation of the family of the said Oomdut Ool Oomrah Bahadoor, the Nabob of the Carnatic, on the 29th day of September 1801, acknowledged by Lord Clive, then Governor of Madras, to be the sons of the said Oomdut Ool Oomrah Bahadoor, the Nabob of the Carnatic; and a pension of 10,000 rupees was granted to each of them, the said Shasavar Jung Bahadoor, deceased, and the said Mahomed Bauker Hoossain Khan Bahadoor, as the Nicka sons of the said Oomdut Ool Oomrah Bahadoor, the Nabob of the Carnatic, deceased, which pension has since been and still is paid to the said Mahomed Bauker Hoossain Khan Bahadoor.

"That the said Mahomed Bauker Hoossain Khan Bahadoor has been admitted by the defendants Mayroon Nissa Baigum and Madar Ool Oomrah Bahadoor to be the brother of the said Shasavar Jung Bahadoor, the former by her Counsel and Proctor on the hearing of the Ecclesiastical suit in the Supreme Court in which her right, as widow of the said Shasavar Jung Bahadoor, deceased, was established and declared, and by the said Madar Ool Oomrah Bahadoor in the late Nabob's Maukamah Court, and in certain writings under his hand."

The claim was opposed on behalf of the respondent, the daughter and only child of Shasavar Jung Bahadoor; and evidence was adduced on each side in support of it and against it. Upon the whole of the evidence (it is set forth in the Appendix), the Master reported in the appellant's favor, finding that the appellant was the son of Oomdut Ool Oomrah, by "his Nicka wife" Ameen Sahiba, and was the brother of Shasavar Jung Bahadoor. But exceptions to the report were taken by the respondent, and, upon argument, decided in her favor by the Supreme Court; a decision that produced the appeal now before their Lordships, which was argued here fully and very well.

The exceptions and the order allowing them (which will be found in pp. 40 and 41 of the Appendix), are thus :—

"*First Exception.*—For that the said Master hath, in and by the said separate Report, rejected the Exhibit C mentioned and set forth in his said Report, and offered as evidence on behalf of the plaintiff, in support of her state of facts and charge left in this cause on the 23rd day of April 1858; whereas the said Master ought not to have rejected such Exhibit C, but ought to have admitted it as evidence for the said plaintiff.

"*Second Exception.*—For that the said Master hath in and by the said separate Report, found that Mahomed Bauker Hoossain Khan Bahadoor is the brother of Shasavar Jung Bahadoor, the intestate, in the pleadings of this cause named; whereas the said Master ought to have found that the said Mahomed Bauker Hoossain Khan Bahadoor is not the brother of the said Shasavar Jung Bahadoor, deceased.

"Wherefore the said plaintiff doth except to the said Master's separate Report, and appeal therefrom to the judgment of this Honorable Court.

"The matter upon the exceptions taken by the plaintiff to the separate Report of Charles Martin Teed, Esq., the Master of this Honorable Court, dated the 10th day of June last, made in pursuance of the decree made on the hearing of this cause, and bearing date the 9th day of February last, coming on to be argued this present day before the Honorable the Supreme Court of Judicature at Madras, in the presence of Counsel learned on behalf of the said plaintiff and Mahomed Bauker Hoossain Khan Bahadoor; and the said Exceptions and Report being opened, upon debate of the matter on hearing what was alleged by the Counsel on both sides: This Court doth order that the said Exceptions be allowed, with costs of the proceedings had before the said Master, and of this application and order.

"By the Court."

In the view that their Lordships take of the matter, the first exception is unimportant: for, whether the document to which it relates be considered or not considered as part of the evidence, the conclusion as to the question of legitimacy must, according to their Lordships' opinion, be the same; and with regard to that question, their Lordships find it to be, if not established, at least highly probable, that the appellant, who seems now to be between fifty-eight and sixty-two years of age, was born in the house of Chaittore Begum, a Nicka wife of Oomdut Ool Oomrah; and it appears to be clear that he (the appellant) is the son of a

* Amended this 15th April 1858 to "on or about the month of December."

† Amended this 15th April 1858, "and was born on the 10th June 1800."

woman who was as a protegée or dependant, if not a servant, of that lady. She seems to have brought up the appellant's mother, Ameen Sahiba, mentioned in the Report, and to have taken an interest in her. It appears likely that Ameen Sahiba, from a time preceding her adolescene, until the death of Chaittore, had no other home than the residence of Chaittore, and that Oomdut Ool Oomrah, whether legitimately or illegitimately, was the father of the appellant, and so, from the time of his birth, reputed generally to be; their Lordships, by using the term "reputed generally," not however meaning to affirm or deny that there ever was any acknowledgment of the paternity by Oomdut Ool Oomrah. He (Oomdut Ool Oomrah) died before the year 1802, and was survived for several years by Chaittore. She was survived for several years by Ameen Sahiba, and since the death of Ameen Sahiba some years have elapsed.

More than once in the proceedings before us, Ameen Sahiba is described as a slave. Their Lordships, however, believe, and it has been, by the Counsel on each side, at the bar, expressly and distinctly admitted, that she was not so. Their Lordships, accordingly, for every purpose of the present litigation, assume that Ameen Sahiba, during her whole life, was free.

Chaittore, who seems not to have had any child of her own, appears to have adopted the appellant from the time of his early childhood, if not from the time of his birth, and thenceforth during the whole of her life to have treated him as her son; and both the appellant and his mother lived continually, as it seems, with Chaittore until her death—the appellant from his birth, his mother from a time preceding that event. The appellant's examination in support of his state of facts contains but an indistinct and indirect, if it contains any, allegation that his mother was the wife of Oomdut Ool Oomrah.

Proceeding on the basis of these remarks, their Lordships deem it necessary or convenient now to divide the evidence into two portions: the *first* consisting of the testimony of two widow ladies, named Shurfoon Nissa Baigum and Fakroon Nissa Baigum (pp. 12, 13, 14, Appendix), and the *second* consisting of all the rest of the evidence; and to consider the second portion previously to considering the first; and, in considering the second portion, to deal with it as if the first were not existing. So, viewing the evidence, their Lordships are of opinion that what has just been described as the second portion of it is insufficient to support the appellant's contention that he is the legitimate or legitimated son of Oomdut Ool Oomrah. By the second portion of the evidence it is not shown that there was at any time a ceremony of marriage between him and Ameen Sahiba, or that she at any time claimed or professed or represented herself to be his wife or widow, or was at any time acknowledged by him as his wife, or was by the Government or otherwise at any time recognized or treated as his wife or widow. Though five other ladies, as his widows, had allowances from the Government, she had none.

The case, too, thus regarded, there is no proof that Oomdut Ool Oomrah at any time treated, recognized, or acknowledged the appellant as his son, and it does not (we think) help the appellant that, soon after his alleged father's death, the appellant, as a member of Oomdut Ool Oomrah's family, had a pension from the Government, which the appellant still enjoys, and which there seems to their Lordships to be no reason in point of justice, fairness, or propriety, why he should not continue to enjoy. That pension was, with the assent and concurrence of the family of Oomdut Ool Oomrah, certainly allotted to the appellant, then a minor, in very early childhood, as a son of Oomdut Ool Oomrah, but also as the son of Chaittore, which, by adoption, though by adoption alone, as already mentioned, the appellant was: nor can he, in our opinion, be taken to have had, or to be enjoying, any Government pension or Government allowance whatever in the character of a son of Ameen Sahiba. It was for the pecuniary interest of Chaittore, with whom the mother and the son were living, to represent the appellant as Chaittore's son, and if Ameen Sahiba was not a widow of Oomdut Ool Oomrah, it was for her interest also, and that of the appellant, that he should not be represented as her son. Their Lordships are of opinion that, unless the testimony, forming what their Lordships term the first portion of the evidence, ought to be deemed credible and of some weight, the appellant's claim fails. Is, then, Shurfoon Nissa Baigum, or Fakron Nissa Baigum, a credible witness? They have deposed thus:—

"Shurfoon Nissa Baigum, a widow, residing at No. 25, in Amyapah Moodelly Street, at Royapettah, within the local limits of Madras, produced, the 19th day of April 1858, for examination before the Master in support of the state of

acts and charge of Mahomed Bauker Hoossain Khan Bahadoor, left in this cause, having been first duly sworn, said: I know Mahomed Bauker Hoossain Khan. I knew his mother and father, who was my brother. There was a girl inside the house; he married her by Nicka. The Nabob Oomdut Ool Oomrah married by Nicka Ameen Sahiba. Some time after the Nicka marriage, Bauker Hoossain was born. Immediately on the birth of the child he was given in adoption to Chaittore Baigum. I was present at the Nicka. The Nicka was read outside. The people came in, tied a Lutcha, and put a nose ornament. The Lutcha was tied on Ameen Sahiba, and the nose ornament was put on her; I cannot say who by, there were so many persons present. I do not know if any of the people are alive except us two. After the Nicka ceremony Oomdut Ool Oomrah and Ameen Sahiba lived as husband and wife. After Bauker Hoossain Khan's birth, Ameen Sahiba was in the Chaittore Baigum's house. Bauker Hoossain Khan has been treated by myself as my brother's son, as my nephew. I knew Shasavar Jung; he was the son of my brother Oomdut Ool Oomrah. Shasavar Jung's mother was Koolsoon Baigum, who brought him up, and Bauker Hoossain was brought up by Chaittore Baigum.

"*Cross-examined by Mr. Wilkins.*—Ameen Sahiba was a child of a poor man: I do not know his name. Ameen Sahiba was not a slave girl in the family; she was the child of a poor nobleman, who, being unable to support his child, gave the child to be supported by Chaittore Baigum. I know this because we were in the habit of going to Chaittore Baigum's house, and she in the habit of coming to us. Upon asking Chaittore Baigum, she said it was a poor nobleman's child, and I bring her up; she did not say who the poor nobleman was, and we did not ask. I was present when the Nicka took place. I was not in the Dewanah Khanah when the Nicka was read and took place. I was among the assembly of the females. Ameen Sahiba died lately, about seven or eight years ago.

"*Re-examined by Mr. Ritchie.*—Ameen Sahiba lived in Chaittore Baigum's house up to the time of her death.

Examination of Fakroon Nissa Baigum.

"Fakroon Nissa Baigum, a widow, residing at No. 16, in Vencatachellum Chetty Street, at Triplicane, within the local limits of Madras, produced the 19th day of April 1858, for examination before the Master in support of the state of facts and charge of Mahomed Bauker Hoossain Khan Bahadoor left in this cause, having been first duly sworn, saith: I know Mahomed Bauker Hoossain Khan Bahadoor. I knew his mother; she was called Ameen Sahiba, but commonly known by the name of Budde Beebee; she married Oomdut Ool Oomrah by a Nicka ceremony. Oomdut Ool Oomrah was my brother. I was present at the ceremony. This was many years ago. It took place in the Chepauk Garden. I cannot say when Mahomed Bauker Hoossain Khan Bahadoor was born, but he was about a year or a year and-a-quarter old when his father died. I knew the late Shasavar Jung Bahadoor; he was my nephew; he was the step-brother of Mahomed Bauker; when they were young, they were received as brothers and played together; when they grew up, they remained separate. Mahomed Bauker was brought up by Chaittore Baigum, who was the mother of Shasavar Jung. Mahomed Bauker was born after the Nicka marriage of Ameen Sahiba. Oomdut Ool Oomrah used to call the child to him, see it and caress it, and treated him as he did Shasavar Jung. Mahomed Bauker has been received by myself and other members of Oomdut Ool Oomrah's family as his son.

"*Cross-examined by Mr. Wilkins.*—I am seventy-five years old. Ameen Sahiba was the daughter of a poor woman, who was not a slave girl; I do not know who the father of Ameen Sahiba was. I do not know if the Cauzee was present at the time of the Nicka marriage. The ceremony took place outside, and the ladies were all collected inside of the house on occasion of the ceremony. I was in the assembly. I saw the Nicka was read; it was read in the Dewan Khanah; afterwards the people came where the ladies were, and congratulated each other. I was not present in the Dewan Khanah when the Nicka ceremony was read. After this was read outside, the people came in where the ladies were, and tied the Lutcha and put the Nuttoo. The Nuttoo was put in the nose of Ameen Sahiba; I do not recollect who did this. The Lutcha was tied on the neck of Ameen Sahiba; I do not recollect who tied the Lutcha. Before her marriage Ameen Sabiba was a Mussulman's child, a poor man's child; and was brought up in the house of Chaittore Baigum. Ameen Sahiba is dead; she lived many years after Mahomed Bauker's birth. I do not know anything more of the Nicka than I have said. I know nothing about the dowry.

"*Re-examined by Mr. Ritchie.*—I did not hear the Nicka read. Ameen Sahiba was inside the Zenanah with the females during the whole of the marriage ceremony. Ameen Sahiba was of a marriageable age at the time of the ceremony. After the ceremony Ameen Sahiba lived in the house of Chaittore Baigum. Chaittore Baigum was the wife of Oomdut Ool Oomrah."

Whatever may have induced the ladies to give this testimony, their Lordships find themselves unable to credit it. They think it very highly improbable that, if a ceremony of marriage between Oomdut Ool Oomrah and the appellant's mother, of any such kind as that stated, or of any kind, had taken place with such a degree of publicity as that alleged by the two ladies, or with anything like it, the fact would not have been proved also by some other witnesses or witness, notwithstanding the lapse of time. Nor do their Lordships believe that Chaittore or Ameen Sahiba would so have conducted herself, or so acted as they respectively appear to have done, if there had been any such marriage. The conduct of both is so strongly opposed to the notion of a marriage between the protegèe, dependant, or servant, and the husband of the protectress, patroness, or mistress, as to render it impossible for their Lordships to think that such a marriage took place, upon the foundation merely of the evidence before them. Why had not Ameen Sahiba, why did she not claim, a house or establishment of her own? Why did she continue in that of Chaittore? Why not have, why not claim, an allowance from the Government? Why concede, as she seems to have conceded, her son to Chaittore? Why rest contented or discontented in the humble and dependent, and

almost, if not altogether, ignominious position in which she remained, when five wives of the Prince (her husband as now alleged) has establishments and allowances agreeing with his rank? Their Lordships think that not a single portion of the evidence of either of these two ladies can be trusted, and, if that is so, there is (it cannot be necessary to repeat) no proof that Ameen Sahiba was ever married, nor proof that she ever represented herself as a married woman or as a widow, nor proof of any acknowledgment on the part of the alleged father by word or deed, by language or conduct, that he was her husband, or the father of her son.

Their Lordships, therefore, hold that the judgment under appeal is right, unless as to costs. But, in arriving at this conclusion, they wish to be distinctly understood as not denying or questioning the position that, according to the Mahomedan Law, the law which regulates the rights of the parties before us, the legitimacy or legitimation of a child of Mahomedan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents, or of any formal act of legitimation.

Here there is, in their Lordships' judgment, an absence of circumstances sufficient to found or justify such a presumption or such an inference.

With regard to costs, however, their Lordships do not impute to the appellant either wilful or corrupt perjury, or subornation of perjury; and, therefore, not merely from the Master's opinion, but from the circumstances of the case also, they consider the appellant's claim, though untenable, so excusable that they will humbly recommend to Her Majesty that the appellant should not be subjected to any costs (except his own) of the proceedings before the Master, or of those before the Supreme Court; that the order before them should so far, and only so far, be varied; and that there should be no costs of the present appeal.

The 17th February 1864.

Present:

Lord Kingsdown, Lord Justice Knight Bruce, Lord Justice Turner, Sir L. Peel, and Sir J. W. Colvile.

Hindoo Law of Inheritance—Sisters—Daughters (Marriage and Marriage portions of).

On Appeal from the Supreme Court of Bombay.

Venayeck Anundrow and others

versus

Luxoomeebaee and others.

According to the Hindoo Law, in Bombay at least, sisters are heirs of their brothers.

The marriage of daughters and their marriage portions do not exclude them from participation.

The question raised by the demurrer, the subject of this appeal, is whether the plaintiffs in the suit, the appellants, have, by the statements in their Bill, shown any interest in the estate of Bhugwantrao, the testator in the cause, or any concern with it. If they have not, the demurrer was rightly allowed.

Bhugwantrao was a Hindoo, resident at Bombay. He died in the year 1851, having made his will in the English language, dated in that year. He appointed his wife, one of the respondents, now his widow, sole executrix, and, in addition to some directions, which need not be now particularly mentioned, he expressed himself thus: "All the outstanding debts due to me must collect, and after paying legal debt due by me, and the expense of the funeral and other ceremonies during the first year of my death, the remainder property, both moveable and immoveable, &c., I give and bequeath to Luxoomeebaee, my dearly beloved wife, and my little son Gujanon, an infant." Then follows an expression which has with propriety been the subject of observation, namely, the expression "the joys, &c., I have made for my wife and children, they belonging themselves respectively." Their Lordships, however, consider that the word "respectively" has no application to the gift of the residue, but refers only to whatever may have been meant by "the joys," &c.

The Testator, as has been said, died in the same year, survived by his wife, the executrix, one of the respondents, and her three daughters by him, who are also respondents, and by the infant son Gujanon, who died in the year 1853, a child under four years of age.

Observations have been very properly made concerning the true construction of the words of the gift of the residue—whether as giving or not giving an absolute interest, and whether as giving or not giving an interest, in the nature of what English Lawyers call a joint-tenancy, or as giving or not giving an interest of the nature of what English Lawyers call a tenancy in common. In the circumstances that happened, their Lordships do not think it necessary to give an opinion upon that point or those points of construction: for whether the gift was absolute, or not absolute, whether in common as we call it, or in joint tenancy as we call it, upon the testator's death, the widow and his son took the whole between them, at least in possession, and upon the death of the son, an infant of tender years, the widow became in every possible view entitled to the whole, at least for her life. There is no possible claim to an interest in possession in the appellants Their claim is thus: They contend that, upon the death of Gujanon, the absolute interest in the whole, or a moiety, subject to a life-interest in the widow, devolved upon his heirs, and that those heirs were the appellants, and not the three daughters of the testators, the co-respondents with the widow. They make out, they say, that proposition by the nature of their relationship, namely, that they were the sons of the brother of the Testator, and being so related in the male line, they excluded by law, they say, the sisters of Gujanon from the heirship to him, a proposition which the respondents deny.

Now, upon the question of the capacity of the sisters to be heirs to their brother, different views of the law appear to have been taken in different parts of India, and a general leaning in favor of excluding the sisters in such a case appears to prevail in Bengal, but appears not to prevail in the territories of Bombay. It is a point upon which probably it may be said that a reasonable difference of opinion may be entertained; but the authorities most regarded in Bombay, whence this case comes, seem to be in favor of preferring the claim of the sisters to the claim of the male paternal relatives, the cousins. The Chief Justice, in giving his judgment in the present case, quotes a book with which we are not familiar here, but which seems to be well known in Bombay, and to be considered and treated as an authority there. He says (page 9 of the Appendix, line 29): "Supposing, then, Luxumabai to take a life-estate only in the descended inheritance, the reversion vests in the next heir of Gujanon, and, upon the best authorities recognized in this Presidency, that heir is his sisters, who are defendants in this suit. This appears, from Muyakhu, Chap. IV., p. 19, where, after enumerating the mother (*see* pp. 14 and 15), the uterine brother and his sons (Sections 16 and 17), the paternal grandmother (Section 18) (and no paternal grandmother of Gujanon is shown to be in existence on the face of this Bill), the Commentator, in Section 19, proceeds thus: 'In default of her (the paternal grandmother) comes the sister, under this text of Menoo. To the nearest Sapinda (male or female) after him (or her) in the third degree the inheritance next belongs, and thus of Bruhuspitia, where many claim the inheritance of a childless man, whether they may be paternal or maternal relations, or more distant kinsmen, he who is the nearest of them shall take the estate.' And the next rank is hers (the sister's), both from her being begotten under the brother's family name, and there being no further reservation with respect to the Gentile relationship. Neither is she mentioned in the texts as an occasion of taking the wealth, but as next of *kin* she succeeds. Considering the high authority of the Muyukhu on this side of India, this might alone seem sufficient to establish the position that the sister comes next in order of inheritance after the paternal grandmother; but, according to certain Commentators on the Mitackshara, the sister comes next in order of inheritance after the brother. The passage in the Mitackshara is contained in the first paragraph of Chapter II., Section 4: 'On failure of the father, brethren share the estate.' Nanda Pandita and Balam Bhatta, says Mr. Colebrooke, in his note to this passage, consider that, as including 'brothers and sisters' in the same manner in which 'parents' have been explained 'mother and father,' and conformably with an express rule of Grammar. They observe that the brother inherits first, and, in his default, the sisters; this opinion, Mr. Colebrooke states, is controverted by Camalacara and the author of Muyukhu.

It certainly is so in Section 16 of Chapters IV. and VIII. of the Muyukhu, p. 105; but it should be observed that in p. 15 of the same commentary the doctrine of the Mitackshara, now generally regarded as established as to the word 'parents' including both 'mother and father' is controverted, and on precisely the same grammatical grounds."

Their Lordships desire not to be understood as expressing an opinion that the general course said to be taken in Bengal upon this subject, or upon the construction of the word 'brethren,' is wrong; but certainly neither are they satisfied that the construction put by the passage in the Mitackshara, which has been mentioned, and generally adopted, as it seems in Bombay, is wrong. Their Lordships come to the conclusion that the general rule in Bombay has long been, and is, to treat the sisters as heirs to the brother rather than the paternal relatives of the description of the present plaintiffs. Accordingly, their Lordships think that they may safely and properly, in the present instance, adopt or accept that rule. They consider that, in Bombay at least, the sisters, in such a case as this, are the heirs of the brother. The consequence is that, in whatever possible manner the Will of the Testator is read, the entire interest in the property in question must, we think, be viewed as vested in the widow and her daughters, or some or one of them, and that, therefore, the appellants here, the sons of the brother of the Testator, are suing in a matter in which they have not shown the slightest interest, nor with which have they any concern. The result is, in their Lordships' opinion, that the demurrer was rightly allowed, and that the appeal should be dismissed with costs.

It ought to be added, as to the argument that the marriage of the daughters and their marriage portions excluded them from participation, that their Lordships think there is no ground for that argument either in principle or otherwise.

The 26th July 1865.

Present:

Lord Justice Knight Bruce, Lord Justice Turner, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

Registration Act (XIX. of 1843)—Construction of.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Sreenath Bhuttacharjee

versus

Ram Comul Gangooly, Gobind Chunder Mozoomdar, Gobind Chunder Sen, Taraprosono Mookerjee, and Chunder Coomar Roy, by substitution for Juggut Chunder Mookerjee.

The words "any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certificate notwithstanding" in Section 2, Act XIX. of 1843, refer not only to the mortgages and certificates mentioned in that part of the Section which immediately precedes these words, but extend also to the deeds of sale or gift which are mentioned in the earlier part of the Section.

The words "provided its authenticity be established to the satisfaction of the Court" in the same Section, point not merely at the exclusion of a forged deed from the benefit of the Act, but also of a deed tainted by fraud although in other respects genuine.

In disposing of this appeal their Lordships do not think it necessary to enter fully into the details of the case. The view they take of it will be sufficiently explained by a mere general outline of the facts. Ramcomul Gangooly was originally mortgagee of the entirety of the zemindary, pergunnah Havaleshur. He subsequently acquired the full proprietary right to and possession of the zemindary by a foreclosure suit, and suit for possession consequent thereon, and after he had thus acquired the proprietary right in the zemindary he applied for the mutation of names in the Collectorate, and was there registered as sole proprietor of the whole zemindary. The appellant, Sreenath Bhuttacharjee, alleges that Ramcomul Gangooly, before he had acquired the proprietary right in the zemindary by an ikrar or agreement for sale, dated the 20th December 1852, agreed with Taraprosono Mookerjee that, in the event of his acquiring the proprietary right, he would transfer a moiety of the zemindary to Taraprosono, and that, after he had acquired the proprietary right, he, by a kubala or deed of sale, dated the 31st July 1853, transferred the moiety of the zemindary to Taraprosono accordingly. The moiety of the zemindary thus transferred to Taraprosono was, as the appellant alleges, afterwards conveyed to him by deed, bearing date the 27th March 1854; but this deed was not registered until the 2nd May 1854. In the meantime, and on 5th April 1854, Ramcomul Gangooly by a deed of that date, in consideration of the sum of 90,000 rupees, conveyed the whole zemindary to Gobind Chunder Mozoomdar, and by a deed of even date Taraprosono Mookerjee, in

consideration of the sum of 15,000 rupees, also conveyed all his interest in the zemindary to Gobind Chunder Mozoomdar, and on the 20th April 1854 both these deeds were duly registered.

After the execution of these deeds Gobind Chunder Mozoomdar had possession of the whole zemindary, and he was in possession of it when the suit, out of which this appeal has arisen, was instituted.

This suit, which is in the nature of an ejectment suit, was instituted by the appellant against Ramcomul Gangooly, Gobind Chunder Mozoomdar, and Taraprosono Mookerjee, and several other persons, for recovering the moiety of the zemindary alleged to have been conveyed to the appellant in manner above mentioned. The plaint in the suit alleges that Ramcomul, through fraudulent motives, had disposed of the whole zemindary (including the moiety previously sold by him to Taraprosono Mookerjee) to Gobind Chunder Sen in the fictitious name of Gobind Chunder Mozoomdar, under a kubala, dated the 4th April 1854, for consideration of 90,000 rupees, but the plaint contains no allegation whatever of any fraud on the part of Gobind Chunder Mozoomdar.

Gobind Chunder Mozoomdar by his answer wholly denies the title set up by the appellant, and rests his case on the conveyance to him by Ramcomul. He sets up no title under Taraprosono Mookerjee, and, on the contrary, he says that Taraprosono Mookerjee had no right or interest in the zemindary, but it appears, both by the answer and throughout the proceedings in the suit, that Taraprosono Mookerjee had under his alleged ikrar and kubala set up claims to the property, and the answer in effect treats the release from him as obtained for the purpose of putting an end to those claims. There is a great deal of evidence in the cause with reference to the most part of the alleged ikrar and kubala set up by the appellant; but on the hearing of the cause before the Principal Sudder Ameen, he dismissed the suit, and upon appeal this decree was affirmed by the Sudder Court. The appeal before us is from these decrees.

The judgments, both of the Principal Sudder Ameen and of the Sudder Court, appear to have proceeded upon a full and careful examination of the facts of the case: but their Lordships, as they have intimated, do not find it necessary to enter upon this examination.

It appears that, by the Indian Act XIX. of 1843, which is set out in the Schedule to the appellant's case, it is provided "that from the first day of May last every deed of sale or gift of lands, houses, or other real property, a memorial of which has been or shall be duly registered according to law, shall, provided its authenticity be established to the satisfaction of the Court, invalidate any other deed of sale or gift for the same property which may not have been registered, and whether such second or other deed shall have been executed, prior or subsequent to the registered deed; and that from the said day every deed of mortgage on land, houses, and other real property, as well as certificates of the discharge of such encumbrances, a memorial of which has been, or shall be, duly registered according to law, and, provided its authenticity be established to the satisfaction of the Court, shall be satisfied in preference to any other mortgage on the same property which may not have been registered, and whether such second or other mortgage shall have been executed prior or subsequent to the registered mortgage, any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certificate notwithstanding."

Their Lordships are of opinion that this case may well be decided, and ought to be decided, upon the provisions of this Act.

Two questions arise upon the Act: *first*, whether the words at the close of the enactment, "any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certificate notwithstanding," are to be construed as referring only to the mortgages and certificates mentioned in that part of the enactment which immediately precede these words, or are to be taken to extend also to the deeds of sale or gift which are mentioned in the earlier part of the enactment; and, *secondly*, what meaning is to be attributed to the words "provided its authenticity be established to the satisfaction of the Court," which are contained in the enactment. As to the first question, their Lordships are of opinion that, upon the true construction of the Act, the words first above mentioned apply not only to deeds and certificates of mortgage, but also to deeds of sale or gift. This enactment, although divided into two branches in consequence of the different effect which

is given to it as to deeds of sale and of mortgage, was plainly intended to be a general enactment. The words we are considering are words of reference, and the terms used being general and comprehensive, their Lordships see no reason for confining their operation to one branch of the enactment rather than extending it to both. Had it been intended that they should be so confined, there would have been no difficulty in expressing that intention. It would be difficult to find any reason why, in the case of a mortgage, priority should be given to a registered deed over an unregistered deed, notwithstanding knowledge or notice of the unregistered deed by the registered mortgagee; but in the case of a sale the priority of an unregistered deed over a registered deed should be retained, in cases of knowledge or notice, by the registered vendee or donee. The too common practice in India of setting up forged and fraudulent deeds, and the security against this practice which is afforded by registration, are quite sufficient to account for this enactment extending both to sales and mortgages, and the policy of such enactments is not unknown in other countries. The Irish Registration Acts afford an instance of it. Then as to the second question. The proviso is that the authenticity of the deed be established to the satisfaction of the Court. The word "authenticity" would seem, according to its natural meaning, to point merely at the exclusion of a forged deed from the benefit of the Act; but their Lordships think that it could not be intended by the Act that a deed which was tainted by fraud, although in other respects genuine, should be placed on the same footing as an honest and *bonâ fide* deed. They are not disposed so to construe the Act, but they think that at all events a registered deed cannot be deprived of the priority given by the Act, unless it be both alleged and proved that there was fraud on the part of the grantee, and in this case no fraud is alleged, and certainly none is proved, on the part of Gobind Chunder Mozoomdar. It would be going much too far to impute fraud to a purchaser upon the mere ground that he had bought up a possible claim, and so far as their Lordships can find there is nothing beyond this affecting Mozoomdar either in point of allegation or of proof. Of course, it has not escaped their Lordships' attention that there is an allegation in the plaint which suggests collusion between Mozoomdar and Taraprosono, but their Lordships see no proof of this. Upon the whole, therefore, they are of opinion that Mozoomdar's deed being first registered, must prevail over the subsequently registered deed of the appellant, and they must, therefore, without entering further into the case, humbly recommend Her Majesty to dismiss this appeal, and with costs.

The 12th February 1859.

Present:

The Judge of the High Court of Admiralty Lord Justice Knight Bruce, Sir. E. Ryan, Sir. J. T. Coleridge, and Sir. L. Peel.

Resumption of Invalid Lakheraj—Intervention by Zemindar—Interlocutory orders (Appeal from, not compulsory)—Decree of Special Commissioners (Finality of)—Review of Judgment—Foujdary Court (Jurisdiction of).

On Appeal from the Special Commissioners of Revenue in Bengal.

Moharajah Moheshur Singh

versus

The Government of India.

In a suit by Government under Regulation II., 1819, to resume invalid lakheraj land held by a Mohunt, as the interests of the zemindar who claimed a portion of the lands sought to be assessed, as forming part of his permanently assessed estate, were liable to be affected by the decision of the Collector. HELD that he had a right to intervene, and become a party to the suit, and to prefer an appeal from the decree.

There is no law which requires a suitor to appeal from interlocutory orders under penalty of forfeiting for ever the benefit of the consideration of the Appellate Court. The Privy Council have, in many cases, corrected erroneous interlocutory orders on the appeal of the whole cause coming before them.

The decree of the Special Commissioners under Regulation III., 1828, is final, if no appeal or petition of review is presented within a reasonably sufficient period.

The object of a review being a re-consideration of the same subject (except in case of death or for some other unavoidable cause) by the same Judge as contradistinguished to an appeal, expedition in presenting a petition for review is indispensable with a view to the hearing of the review before the original Judge.

The Regulations relative to the granting of a review by the Sudder Court are applicable to the granting of a review by the Special Commissioners.

The causes accounting for delay in applying for, and intended to justify the grant of, a review, must be of grave importance.

A reference to certain proceedings had in the Fouzdary Court is no reason for a review, for the jurisdiction of that Court is confined to cases of possession, and it is beyond its province to enquire into and ascertain titles to landed property.

IN the course of the discussion upon this case, two questions have been raised,

which, it appears to their Lordships, are ripe for decision.

The first question is, whether the Revenue Commissioners, who originally exercised jurisdiction upon the present occasion, were, with respect to the appellant, entitled so to do; it being contended on the part of the respondent that the present appellant was never properly a party to the suit.

The next question is, whether the review which was granted in this cause was granted in due conformity with the existing Regulations.

In order to render our judgment clear on these two questions, it is necessary to make a brief statement of the facts out of which they arise.

The original proceedings in this cause commenced in the office of the Deputy Collector of the District. It appears that there is in the province of Behar a pergunnah named Dhurumpore, *containing three zillahs:* but the present suit relates to one only, called Beernugger. This pergunnah was held in perpetuity by the Zemindar for the time being, and his successors, on payment of a revenue to the Government, fixed by a permanent assessment under the decennial and permanent settlement. By this settlement, the Zemindar and his successors were exempted from all payment in the nature of land-tax, save the amount stipulated by the Umuldustick granted to the first grantee.

One of the few exceptions to which such settlements are subject was insisted on by the Government in this case as applicable to some lands within the limits of the zemindary, *viz.*, the tenure of them as lakheraj under an illegal or invalid title. It is an admitted fact that there were certain lands claimed as lakheraj within their pergunnah. Those which became the subject of dispute in this cause were owned by a Mohunt as the head of, and for the benefit of, a community of religious devotees. The lands had, in fact, been enjoyed by them for a long time free from assessment; and between this society, as represented by their head, the Mohunt, and the Government, the dispute arose as to the assessable quality of the lands. The Mohunt had, of course, an interest to enlarge the boundaries of his lands, and unless the contiguous proprietor admitted the boundaries as claimed by the Mohunt, his presence as a party to the suit would seem to be conducive to the correct adjustment of so delicate and important a question, a course to be encouraged with a view to diminish subsequent litigation.

In this state of things, Mr. Henry Beresford, the Deputy Collector, on the 3rd October 1836, commenced the present proceedings by a notice to two persons, Kerperam and Bhugwan Dass: the first being one of the original grantees, and the second the Mohunt supposed to be in possession. Bhugwan Dass was called upon to show his title, and to prove by what authority he held the lands free from payment of revenue.

It is to be observed that these proceedings do not state, by any description whatever, the extent of lands to which this notice applied.

At some of the meetings it appears that the Mooktar of the Zemindar had accidentally or otherwise been present, and had been questioned by Mr. Beresford, the Deputy Collector. Under these circumstances, the Zemindar, apprehending that his interests might be affected by any decision of the Collector declaring the lakheraj lands to be more extensive than they really were, intervened by petition; and it appears to us that, in every view of the case, he had an interest which justified him in so doing: for even assuming it to be true that the Collector's report, as to the extent of the land subject to revenue, was not binding on the Zemindar, and that he had a remedy against such a proceeding in another Court, still he had clearly an interest in averting an erroneous report being made to his prejudice, the creation of *primâ facie* evidence prejudicial to himself, and the necessity of resorting to the Civil Courts to remedy an evil already inflicted.

And this view of the case seems to have been taken by all parties and by all Judges who were cognizant of the cause; throughout the whole of these proceedings no objection was ever raised to his intervention; he was allowed the privileges of a party by the examination of his witnesses, and otherwise; and he was subjected to all the inconveniences of a suitor by the condemnation in costs in virtue of the ultimate decree.

Looking at all that passed, and considering that, in every possible point of view, the zemindar had an interest to protect before the Collector, we think it quite vain to contend that he was not both *de-facto* and *de-jure* a party to this cause, or that he had not a sufficient interest to justify him in assuming that character, or that the Collector and Commissioners were in error in so receiving him; therefore, we think that the plea to the jurisdiction has entirely failed on that ground.

We will now follow the course of these proceedings so far as it is necessary for our present purposes. Mr. Henry Beresford hav-

ing made an investigation, which to him appeared to be satisfactory, having previously prohibited the Zemindar for collecting the rents from the disputed lands on the 28th January 1838, gave his decision, and by that decision, 14,816 beegahs of land were subjected to assessment: the Zemindar appealed to the Appellate Court, namely, to the Special Commissioner of Revenue, under Regulation III. of 1828. On the 6th December 1841, Mr. Moore pronounced judgment to the effect that 3,513 beegahs alone were assessable, and that the collections made by Government on other land should be restored to the possessors: on the 8th March 1842, this judgment was confirmed by Mr. Doyly, another Special Commissioner. On the 21st September 1847, a petition for a review on behalf of the Government was presented to Mr. Edward Currie, another Special Commissioner, which petition of review was granted. A hearing took place accordingly. Mr. Currie reversed the judgment of March 8th, 1842, by an order bearing date 24th April 1848, which was confirmed by Mr. Jackson in June 1848.

Although the question which we have now to determine is distinct from that of the merits of the case, yet it is one of very grave importance, as it respects the rules to which the Special Commissioners are to be subject in reviewing a decision which has been made in a resumption suit. We proceed to consider whether the review was granted in conformity with the Regulations existing at that time with respect to the granting a review.

Before we enter into the particulars of that question, we deem it right to notice an objection which was taken at the bar on the part of the respondents, that it was too late now to impugn the regularity of the proceeding to grant the review; that, if the appellant deemed himself aggrieved by it, he ought to have appealed at the time, and that he was too late in doing so after a decision had been pronounced against him.

We are of opinion that this objection cannot be sustained. We are not aware of any law or Regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not so do, of forfeiting for ever the benefit of the consideration of the Appellate Court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing, whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities. We believe there have been very many cases before this tribunal in which their Lordships have deemed it to be their duty to correct erroneous interlocutory orders, though not brought under their consideration until the whole cause had been decided, and brought hither by appeal for adjudication.

Before considering whether this review was granted in conformity with the Regulations, let us look a little to the principles upon which we think lapse of time is a most important consideration. In the present case, five years and a half had passed away since the original decision. Surely, whatever may be the true import of the Regulations, the parties interested in the decision which had been made were entitled, after the lapse of a sufficient period, no appeal having been asserted or petition for a review presented, to conclude that the Government acquiesced in what had been done by the Special Commissioners, and in that rational conviction, to deal with the property upon the footing of the past decision.

Now, what are the evident consequences of delay, unless justified by particular circumstances? Those consequences are, that all the arrangements between man and man, concluded without any reason to suppose they were impeachable, may be set aside and thrown into confusion; producing at one time severe hardship to the proprietor, at another equal evil consequences to those who dealt with him; thus all such arrangements and transactions, which are the very life and soul of property, and which it is equally the interest of the Government to support and encourage, may be disturbed to the detriment of all concerned. We think, for these reasons, that it must have been the wish and intention, as well as the interest of Government, so to frame its Regulations that these principles should be carried into effect, and that after a decision was past, unquestioned by appeal, its finality should be left in doubt no longer than the requisites of justice imperatively demanded.

Let us now address our attention to the Regulations which have passed relative to the question of granting a review. It must be borne in mind that a review is perfectly distinct from an appeal; that it is quite clear from all these Regulations that the primary intention of granting a review was a

reconsideration of the same subject by the same Judge as contra-distinguished to an appeal which is a hearing before another tribunal. We do not say that there might not be cases in which a review might take place before another and a different Judge; because death or some other unexpected and unavoidable cause might prevent the Judge who made the decision from reviewing it; but we do say that such exceptions are allowable only *ex necessitate*. We do say that in all practicable cases the same Judge ought to review; and that for the attainment of that object, expedition in presenting a petition for the review is indispensable, and the only practicable course for attaining that end is by accelerating the hearing of the review before accident or unexpected events shall have removed the original Judge. Looking at all these circumstances, we should naturally expect to meet in the Regulations upon this subject such provisions as would prevent the evils necessarily incidental to delay and procrastination.

It may be well to observe that the Regulations respecting the resumption of lands, and the subjecting them to be assessed, are Regulations in themselves almost necessarily severe in their operation; and while we give to them the force and effect which we are bound to do, as the subsisting law upon this subject, we cannot, and ought not, to forget that though it is manifestly, at first sight, the interest and duty of. Government to bring under taxation as large an extent of land as possible, yet that it is equally the interest and the duty of Government to protect the rights of property; for, if such rights be not protected, there can be no security for the prosperity of any country. For these reasons we must deem it to be our duty, in interpreting and carrying into effect these Regulations, to give full force and effect to those provisions which were manifestly intended to protect the rights of property, and prevent a vexatious interference with those rights.

By Regulation III. of 1828, Section 4, Clause 5, it is enacted that the rules prescribed by the existing Regulations, regarding a review of judgment by the Civil Courts, are to be held applicable to proceedings by the Special Commissioners in revenue cases; those rules are to be found in Regulation XXVI. of 1814, and in the 4th Section. There has been much discussion at the Bar, as to whether the provisions contained in the 2nd Clause of this section are applicable to the present case, or whether it falls within the operation of the 3rd Clause. That 2nd Clause directs that the petition for review shall be presented within three calen months; this provision, however, admits an exception, provided that the parties pre ring the same shall be able to show just a reasonable cause for not having prefer such application within the limited peri It has been contended that, if the Court that is, the Special Commissioner, in this c —is satisfied, no further enquiry can ta place. But we think it clear that this arg ment cannot be sustained, for in the sa Clause the Courts are required to state large their reasons for admitting such app cations after the limited period; if th refuse the review, the decision of the Co below is final; if they admit it, it must reported to the Sudder, and the Sudd may grant it if they think fit. It is man festly clear, therefore, by the provisions these two Clauses—*1st*. That to adm applications is not to grant a review; an *2ndly*. That all that they may do is e aminable by the Sudder.

We are, however, of opinion, that the 2n and 3rd Clauses of this Section must be rea together, and that such of the substanti enactments of both as are in their natur applicable to the Court of the Special Commissioner, regard being had to its independence of the Court of Sudder Dewann Adawlut, must be held to have been applied to it by the Regulation III. of 1828, Section 4, Clause 5. We do not apprehend that a decree passed by a Special Commissioner is to be subject in all respects to the rules applicable to a decree by a zillah, city, or provincial Court, and we think so, because the proceedings of the Special Commissioners are subject to the cognizance of the Sudder; whereas by the provisions of this Regulation, any orders of the Courts specified, granting a review, must receive confirmation from the Court of Sudder Adawlut.

The construction which the Court of the Sudder Dewanny Adawlut has put on these Regulations, by framing its own procedure on reviews, by the provisions of the 2nd and 3rd Sections viewed together, is also the construction which their Lordships think applicable to reviews of the judgments of the Special Commissioners.

Whenever, therefore, a petition for a review of any judgment of the Sudder is presented after three months, it is indispensable that the party preferring such petition should, in the first instance, account for the delay.

The delay being satisfactorily accounted for, the review is to be granted, if, upon a

consideration of the reasons stated, the circumstances of the case shall appear in justice to require it. We think that the true construction of this Clause is a consideration of the reasons stated in the petition presented for a review, and not of other reasons which might be suggested, but not to be found in the petition.

To manifest the great care which the Government of India provided as a guard against improperly granting a review of a judgment, the Sudder Court is required to record on their proceedings the grounds upon which the review is granted.

We are of opinion that all these Regulations applicable to the granting of a review by the Sudder Court of its decrees are applicable to the proceedings of the Special Commissioner, in granting a review of their own decrees.

We have, therefore, in this case to consider two things: *first*, whether just and reasonable cause has been shown for the delay in presenting the petition for review; and *secondly*, whether the circumstances of the case, in justice, required it should be granted.

In order to prosecute our enquiry into these questions, we must look to the petition for the review of the decree of Mr. Moore and Mr. Doyly presented on behalf of the Government on the 21st of September 1847.

We are unable, from a perusal of that document, to discover any satisfactory reason for the delay which has occurred; indeed, there is not to be found in this petition any attempt to state any reason why, looking to all the facts and circumstances as they existed at the time of the judgment of Mr. Moore and Mr. Doyly, the petition might not have been presented within the three months.

But true it is that circumstances might have come to the knowledge of the Government afterwards which may at once justify the delay, and also the granting a review, because, giving a liberal construction to the Regulations of 1814, there might be cases in which fresh evidence would be admissible.

We are, however, of opinion that, for granting a review in the cases we have just supposed to exist, the causes accounting for the delay, and intended to justify the grant of a review, ought to be of grave importance.

Indeed, it is quite manifest that this must be so, or the litigation might be indefinitely suspended, and all the evils incidental to the uncertainty of the rights of property incurred.

Let us look again to the petition for review. The first statement is simply a denial of the correctness of the past decision.

The first reason assigned is that, on the 25th of August 1842, Mr. Elliott and Mr. Doyly came to a contrary conclusion on similar premises. Assuming the fact to be so, and, for the moment, that it was good cause for asking for a review, it is manifest that such cause arose five years before the petition was presented, and there is not the slightest attempt to account for this delay.

And, further, we are of opinion that in a case of this description, the fact of two Commissioners coming to a conclusion not altogether reconcileable with the prior decree of Special Commissioners, is not a sufficient ground, after the expiration of so many years, for the granting a review.

The only other reasons to be extracted from this petition for a review are an impeachment of the grounds of the judgment of the 8th of March 1842, with which the parties must have been cognizant at the time, and therefore would be no excuse for delay, and a reference to certain proceedings had in the Foujdaree Court. We are somewhat surprised that this last circumstance should have been introduced as a reason for a review; for we apprehend the jurisdiction of that Court is confined to cases of possession, and that it is beyond their province to enquire into and ascertain the titles to landed property.

We derive no light from the decision of the Commissioner allowing this review—no further reason is assigned. Upon a consideration of all these proceedings, we have come to the conclusion that, in granting this review, the reasons assigned are wholly insufficient; that the requisites of the Regulation have not been complied with; that no just and reasonable cause has been shown for the delay in presenting the petition; and that that petition does not state any circumstances which, in justice, require the granting the review. It necessarily follows that, if the review was granted without due regard to the Regulations governing such proceedings, it, and all that has been done under it, must fall to the ground. We shall, therefore, humbly advise Her Majesty to reverse the decree of the 8th of June 1848, and to affirm the decree of the 8th of March 1842, and, further, as imperatively required by justice, to condemn the Government in all the costs incurred both in the Courts below and upon the appeal, incurred in all the proceedings since the 8th of March 1842.

We believe that a decree of this tenor will be in strict conformity with the Regulations which have the force of law in India, and, at the same time, may contribute to insure a just confidence that these special jurisdictions, which in some degree displaced the ordinary tribunals of the country, will carefully observe those rules which have been prescribed to regulate their proceedings—rules which have been wisely introduced to guard against the possible abuse of authority, and a departure from which would be likely to produce distrust, and to defeat the principal objects of their institution.

The 18th March 1859.

Present :

Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, the Judge of the Court of Probate, and Sir L. Peel.

Recovery of debt upon alleged agreement—Evidence.

On Appeal from the Sudder Dewanny Adawlut of Madras.

Katchy Kullyana Rungappa Kalaka Thola Oodiar, Zemindar of Oodiarpalliam,

versus

Baloosamy Chetty.

Suit for the recovery of a debt upon agreement which was not brought forward or alleged to be in existence, when the same demand was successfully disputed in a former suit brought during the infancy of the predecessor of the present appellant, who was the son of the alleged original debtor. The respondent having failed to account satisfactorily for the non-production of the agreement before, and the probabilities of the case being against the genuineness of the agreement, the suit was dismissed.

THIS was an appeal from a decree of the Sudder Dewanny Adawlut at Madras, reversing a judgment pronounced by the Zillah Judge of Trichinopoly, before whom proceedings by plaint had been instituted for the purpose of recovering against the present appellant an alleged debt stated to be due from his father. The Judge of the Zillah Court of Trichinopoly, not being satisfied with the evidence, pronounced against the demand. The Court of Sudder Dewanny, having taken a different view of the evidence, came to a different conclusion, and this appeal is the consequence.

The original plaint was filed in the early part of the year 1847, and proceeded upon a bond of old date, given, or alleged to have been given, by the father of the defendant, the appellant here ; and, inasmuch as the suit would have been barred by length of time, unless something had taken place subseq to the bond, the suit also proceeded upo agreement of a later date, which would b the demand within time.

The agreement is set out in page 7 of Appendix in these words :—

" Agreement executed on the 30th ti Jaya (10th February 1835), by Katchy R gappa Kalaka Thola Oodiar, zemindar of diarpalliam, to Baloosamy Chetty, son Kitchy Chetty, of Combaconum. Whe 2,000 rupees, due under a bond execute your father on the 22nd anee of Vyaya (4th, 1826), and 250 pagodas, due unde sunnud issued on the 22nd perattasee of said year, directing the said sum of pagodas to be paid out of the produce of village of Anandavady, has not been paid to this date : I do hereby promise to pay the sum of 2,875 rupees, with inte amounting to 2,875 rupees, making in 5,750 rupees, before the 30th tie of Volum (10th February 1839). Should I fail to you the said sum of 5,750 rupees within time above specified, I further promise pay you the said sum, with interest at per cent. per annum from this date. stamped paper cannot be procured just n this agreement has been executed on paper. Thus do I execute this agree with my free will and consent.

" The writer hereof is Mahalingien."

This instrument purports to be signed Katchy Rungappa Kalapa Thola Oodiar, zemindar, and there are, or purport to four attesting witnesses.

The Zillah Judge was of opinion that was not shown to be a genuine docume and, having come to that conclusion, the evitable consequence was the dismissal the suit. On appeal, the Court of Sud Dewanny, as has been said, came to a diff ent conclusion.

Now, the attesting witnesses, or alleg attesting witnesses to this document, ha been examined, and some other persons w are alleged to have been present ; but, their Lordships' judgment, they are not p sons of a station or position or in circu stances likely to have brought them up the scene as witnesses on the occasion which their testimony is applied. That co sideration, however, would, in their Lo ships' judgment, not of itself have been fa to the demand, but for some other conside tions which present themselves.

It appears that this claim was broug forward during the infancy of the predece

of the present appellant, who was the son the original debtor, who was stated to e entered into the bond, and it was ought before the Collector. The matter s debated, and the claim was rejected by Collector in the year 1841; and one of most remarkable circumstances in the e is, that, although the demand was then puted, and successfully disputed, and, as been said, rejected, the alleged agreent of the 10th February 1835, which, if uine, cleared the matter from all doubt to the truth and honesty of the debt, was t brought forward, and was not alleged to in existence.

Of course, it became necessary in the pret suit for the respondent, the alleged creor, when he brought that agreement forrd, to state a reason of some kind for not ving produced it before; and his reason s singular enough. He had claimed the bt as one immediately due, but this docunt of 1835 had extended the time for the yment of the debt, and accordingly it uld have appeared that he had instituted e suit at a time at which he could not have stained it; and he says that that was his son for not bringing it forward at that e—a circumstance at once and obviously aring against the truth and integrity of a rson who could so conduct himself.

There is another consideration bearing imrtantly upon the probabilities of the case. he date of this document is the 10th of ebruary 1835, and it appears plainly from e proofs in the case that the alleged pares to that agreement were at the moment ngaged in warm and hostile litigation at the me, which was not determined until some me after. It is, therefore, manifest that it as in the highest degree improbable that in ch a state of things the alleged parties to he agreement would have signed such a ocument, or entered into such an agreement.

There is yet another circumstance to which heir Lordships think it not immaterial to llude, *viz.*, that documents are mentioned by he alleged creditor of various kinds, as evilencing the demand, and in effect establishng it, which are never seen, and which were never brought forward.

Now, their Lordships certainly, if the mater had come before them originally, as it did efore the Zillah Judge, would have come to he same conclusion, *viz.*, that the original demand, which could alone sustain the suit, was not proved.

The Judge of the Sudder Dewanny appears to have considered that, if the document had been fabricated, it would have been made more consistent with probability, and not have borne the date or applied to the time which it did; but it is to be remarked that it was necessary to give it a date anterior to the death of the alleged obligor, the debtor, who died in the month of July 1835, the year in the February of which this document was alleged to be executed. Their Lordships, therefore, must respectfully dissent from that observation made by the learned Judge upon this part of the case, seeing that, if forgery was the intent, the intending forger was in a strait, obliged by the force of circumstances to select a date necessarily carrying with it some degree of credibility.

Their Lordships, therefore, think that in such a state of the evidence in support of the claim, the conclusion of the Zillah Judge, which was only that the demand had not been proved, is shown to have been right. We take the same view, as has already been stated, as the Zillah Judge did; and considering that their Lordships will humbly recommend to Her Majesty to reverse the Judgment immediately appealed from, and that the original plaint should be dismissed, we think that the appellant should have his costs, not only in the Courts of India, but also here.

The 23rd June 1859.

Present:

Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, Sir J. T. Coleridge, and Sir L. Peel.

Deed of Partition based on a compromise—Reversal of—Nature of proof necessary.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Maharajah Hetnarain Sing

versus

Modnarain Sing.

A deed of partition between two brothers based on a compromise of suit, ratified by a decree of the Sudder Court, and putting an end to litigation previously entered into by their father, cannot be set aside without strict proof of haste and precipitancy of the settlement, inequality, restraint, or coercion, or fraud.

THIS is an appeal from a decision of the Sudder Dewanny Adawlut at Calcutta, confirming a decision of the Zillah Court of Behar, by which the appellant's suit was dis-

missed with costs. That suit was instituted to set aside a deed of partition, which had been executed by the appellant, and his brother, the respondent, and which partition was, as to the shares of the brothers, based on a solenamah, or instrument of compromise of suit, ratified by the decree of the said Sudder Court. This compromise was entered into in a suit in which the appellant was the plaintiff, and his father Maharajah Mitturjeet Singh, and the appellant's younger brother Modnarain Sing, were the defendants. That suit involved serious and important questions of difficulty concerning the partibility of, and succession to, the estates and property of the father, held by him in connection with his Raj, and his power of disposing of any part thereof by alienation in his lifetime. It involved also the validity of a donation by him to his son Modnarain, and a further question whether the plaintiff had forfeited his inheritance by disgraceful conduct involving a loss of caste.

The appellant had succeeded in the inferior Court, and from the decision of that Court the Maharajah had appealed. In the course of the suit criminations had been mutually made by the father and the son, and the litigation, had it proceeded, would probably have caused to the family much pecuniary loss and some disgrace. By the compromise, a family arrangement was effected, by which the father agreed to pay certain allowances to his sons respectively during his life; they confirmed certain gifts of the father; he dismissed his appeal, and the sons agreed that Hetnarain should, after their father's death, divide the ancestral as well as other property between himself and Modnarain, in the proportion of 9 to 7 annas, the elder son taking the larger share. The Court acted on this instrument, dismissed the appeal, ordered the costs of the vakeels to be paid out of a moiety of the deposit, and the other moiety to be returned to the father, together with the stamp-money on the institution of the appeal. The partible nature of this estate, divisible in these proportions, stood, therefore, between these brothers on the footing of this compromise only. The instrument of compromise, though termed by Hetnarain one of partition, contained no express provision for a partition; but that power flowed from the relation of joint ownership in which they had agreed to stand.

After their father's death, the sons acquiesced in the instrument of compromise. It is immaterial to consider whether either could have disputed it, and whether anything had intermediately been done which entitled ei according to the law as administered in Courts of the East India Company to re from it. The disputes and litigation, w subsequently ensued, turned upon mat consistent with such acquiescence; each cl ed the share of the estate which the co promise secured them, and these proport had no other foundation.

The partition which took place, and wh the suit of the appellant seeks wholly to an and set aside, was, in consequence of fr disputes between the brothers, arising fr their unfriendly feeling to each other, a their mixed enjoyment of the estate under s estrangement, suggested by Mr. Ravensh the Revenue Commissioner for the distr where the property was situate. It was measure substantially in furtherance of t instrument of compromise. From the ev dence of the respectable and wholly un peached witnesses who took part in the p paration of the partition deed under the dir tion of the Commissioner, and, to some e tent, under his own superintendence, it appe to their Lordships that the partition was p pared and settled with care and deliberati without haste or precipitancy, and was e cuted by the brothers openly and publ without restraint or coercion, and with opportunity for enquiry, and on the part both, with presumable competent knowled a presumption which is not rebutted.

The plaintiff, in excuse of his own app ent negligence, supposing his case to be as states it, alleges that he was sick at the tim and incapable of attending to business; b his own temporary incapacity would not ha extended to his competent agents and assi ants in the work; and his own witnesses not represent him as wholly incapacity of acti in matters of business during this time, b on the contrary, as occasionally taking part the transaction of them. The alleged ha and precipitancy of the settlement—anoth explanatory cause which he alleges as co ducive to the success of the deceit which alleges to have been practised against him— also disproved, in their Lordships' opinion, b the evidence as to the *factum* of the dee and the alleged force upon him, which is by him to have proceeded from the Comm sioner, is altogether without proof. That wishes and influence of the Commissioner have operated upon the mind of the appel so as to induce him to join in the partition wh

b

Commissioner applied himself to effect, ery probable; and that species of in- ce a dissatisfied party may readily mute in his own mind into pressure and ion. But their Lordships can find no nce in the case of anything amounting rce or coercion of the appellant; and etter of the Commissioner to the appel- on which so much stress was laid by Roundell Palmer in his able reply, s to their Lordships to bear really the ning which the Counsel for the respon- gave to it. It contains matter of sug- on; and the allusion to the 10,000 es is an allusion to a species of recogni- e not unknown in similar transactions, eby a landed proprietor engages for the e and good order of his zemindary. If, there really were any gross inequality e partition, and, as it is said, the 7-anna r really got in point of profit that which 9-anna sharer should have received, so their positions were in a manner inverted, Lordships would in this case, under all ircumstances in proof of the participation e transaction of the plaintiff's own com- nt agents, be unable to ascribe the failure gligence or mistake.

rruption of such agents would be the probable solution. But the case is doned on the ground of fraud; and ame weakness, indirectness, argumen- eness of the evidence, which displaces that ground of charge, applies equally, if not in greater degree, to the ground of mistake which can have no foundation if the inequality of value be not established. Now, if this inequality really existed to any such extent as would have vitiated the partition, it is difficult for their Lordships to conceive that stronger and direct proof of it could not have been given by the appellant. He must have known, and have had the means of proving, his actual receipts soon after the partition; the actual value was capable of direct proof, yet he offered none of that character.

The Courts in India are very particular in requiring the strictest proof when a deed prepared and executed as this has been, especially where it is one in furtherance of a compromise of suit, is sought to be set aside: a precaution which should never be relaxed there, where the spirit of litigation has so little check, and so much wider means of mischief than it has here. It appears, therefore, to their Lordships that the Courts below rightly dismissed the suit, and that it would be of dangerous consequence to allow deeds of this nature to be impeached on evidence no stronger than that which this case presents.

The view which their Lordships have taken of the evidence as to value renders it unnecessary for them to express any opinion on the other parts of the case. They have no hesitation in recommending to Her Majesty to dismiss this appeal with costs.

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